Petition

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No. 81-722

IN THE

Supreme Court of the United States

October Term, 1981

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION
Petitioner,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress constitutionally can foreclose judicial review of its own legislation.

2. Whether Congress constitutionally can prescribe that money compensation be the exclusive remedy for continuing federal interference with persons' First and Fifth Amendment rights.

3. Whether Congress selectively can restrict the right of a particular racial, ethnic or national group to equitable relief from *ultra vires* federal legislation.

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THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Oglala Sioux Tribe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 1, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, together with the unreported September 11, 1980 opinion of the United States District Court for the District of South Dakota, Western Division which it affirmed, appear in Appendices A and C.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 1, 1981. A timely petition for rehearing was denied on July 30, 1981, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 25:

§ 70k. Limitation of time for presenting claims.

> The [Indian Claims] Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Fifth Amendment:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This proceeding is an action for title and possession of lands which, since time immemorial, were the property and principal place of religious worship of the petitioner. The Treaty of April 29, 1868 (15 Stat. 635) recognized petitioner's title to this area and vested petitioner with rights of "absolute and undisturbed use and occupation." Article II of the Treaty charged the United States with preventing anyone but federal employees from attempting to "pass over, settle upon, or reside in" petitioner's territory.

An Army survey of the area in 1874 reported traces of gold, and the news attracted legions of fortune-seekers. These intruders were trespassers under the 1868 Treaty and guilty of a federal crime under R.S. 2118 (currently codified as 25 U.S.C. § 180). Rather than assist the petitioner in protecting its rights, however, the United States offered to purchase the land for the miners' benefit. When petitioner refused, asserting that this holy place has always been irreplaceable and inalienable, Congress confiscated the territory. Act of February 28, 1877 (19 Stat. 254).

Petitioner brought suit in the District Court for the District of South Dakota Western Division, on July 18, 1980 to quiet title to its territory. The United States, State of South Dakota, several South Dakota counties and municipalities, and a representative group of individuals and corporations asserting title or exercising possession adverse to petitioner were joined as defendants.*

Petitioner challenged the 1877 Act as *ultra vires* and

*The United States, Cecil D. Andrus, in his official capacity as Secretary of the Interior, Bob Bergland, in his official capacity as Secretary of Agriculture, Curtis S. McKee and the State of South Dakota were the only appellees in the Eight Circuit, however.

void *ab initio* in that:

(A) as a candid effort to appease and to avoid criminal prosecution of non-Indians then trespassing on these lands in violation of federal laws and treaties, the 1877 Act was without a constitutionally legitimate "public purpose" and constituted a taking of private property for private use in violation of the Fifth Amendment; and

(B) as a knowing confiscation of lands exclusively and irreplaceably committed to religious purposes, and without which the religion of the Oglalas and other Sioux and Cheyenne peoples could not be practiced, the 1877 Act was an infringement of religious freedom in violation of the First Amendment.

Federal jurisdiction was invoked under 28 U.S.C. §§ 1331(a) and 1362; the American Indian Religious Freedom Act, Public Law 95-341, 92 Stat. 469 (1978), and the nonstatutory power of judicial review implied in Article III of the United States Constitution.

The District Court granted the United States' motion to dismiss on the grounds that the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.*, (Indian Claims Commission Act) creating an administrative tribunal with authority to award money damages to Indian tribes aggrieved by past actions of the United States, constitutes a "sufficient" and "exclusive" remedy for petitioner's claims. The practical effect of this dismissal was to leave petitioner with no remedy at all in law or equity, since the Indian Claims Commission's mandate expired in 1978.

In its assignment of error to the Eighth Circuit Court of Appeals, the petitioner proposed, *inter alia,* that the District Court erred "in construing the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.*, to have the un-

constitutional effect of requiring plaintiff to accept monetary compensation rather than equitable relief for a substantively unconstitutional action of Congress;" and "in ruling that Congress may by legislation excuse itself from a continuing violation of the United States Constitution." The Eighth Circuit affirmed the dismissal of petitioner's complaint, reiterating the District Court's construction of the Indian Claims Commission Act. Appendix A, pages 5a-7a, Court of Appeals' opinion.

RELATIONSHIP TO OTHER CASES

This proceeding should be distinguished from *United States v. Sioux Nation of Indians,* 100 S.Ct. 2716 (1980), an action for money damages specially authorized by Public Law 95-254 (92 Stat. 153), amending section 20 of the Indian Claims Commission Act. The 1868 Treaty confirmed the territorial rights of several Indian tribes, including petitioner here. Each was separately named and signed in its own name by its own representatives. *Sioux Nation* was brought by other 1868 Treaty tribes without the authorization or participation of petitioner, who preferred to elect equitable and constitutional remedies.

Petitioner is not bound by any actions of the "Sioux Nation," for "Sioux" is nothing more than a term of European origin that refers to three linguistic groups. As such, it is no more specific than "european" or "slavonic." What the plaintiffs in *Sioux Nation* chose to call themselves cannot, conformable to constitutional due process, have any bearing on the rights of petitioner, a separate community and polity consistently recognized as such by treaties and laws of the United States.

All of the foregoing jurisdictional facts were specifically

alleged by the petitioner in its complaint in this proceeding. Appendix E, pages 6e-12e, Amended Complaint. Since the appeal was of the District Court's action on a pre-trial motion to dismiss for want of jurisdiction, the facts must be taken as alleged in the complaint. *Springfield Television Co. v. City of Springfield, Mo.*, 428 F.2d 1375, 1376 (8th Cir. 1970).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH LEADING DECISIONS OF THIS COURT CONSTRUING THE SCOPE OF JUDICIAL REVIEW.

The decision of the Eighth Circuit Court of Appeals interprets recent decisions of this Court to hold that payment of money damages can cure an act of Congress that is *ultra vires* and destructive of religious freedom and security of property. Appendix A, page 6a, Court of Appeals' opinion, citing *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). Petitioner believes this interpretation is in error. Permitting Congress to appoint itself the ultimate arbiter of the constitutionality of its own acts, upon offer to pay money damages to citizens, is inimical to constitutional democracy and light-years from the historical position of this Court.

The fundamental genius of the American political system is its establishment of three separate and coequal branches of government, each empowered to check the excesses of the others as measured against the limitations stated in the Constitution.

> Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it is to declare all acts contrary to the manifest tenor of the Con-

> stitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Federalist No. 78, which further observes that

> [t]here is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the Constitution under which it is exercised, is void.

Preservation of the Constitution not only authorizes, but requires courts to check unconstitutional legislation. "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power," Federalist No. 78 continues, "[i]t only supposes that the power of the people is superior to both." In the present proceeding, the United States has prevailed by arguing that the power of Congress is superior to that of the people, that Congress may exceed its constitutional limits and subsequently retreat behind jurisdictional bars of its own making.

The mandatory character of constitutional limitations knows of no exceptions.

> The powers of the legislature are defined and limited; and that these limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

Marbury v. Madison, 5 U.S. 137, 176 (1803) (Marshall, C.J.); also 5 U.S. at 163, 177. Every part of the Constitution is superior to legislation and must be executed by the courts. Congress consequently cannot limit the jurisdic-

tion of Article III courts to exercise all of the Judicial Power conferred on them by the Constitution.

> The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation . . . . If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power.

Martin v. Hunter's Lessee, 14 U.S. 304, 330 (1816) (Story, J.); also *Cohens v. Virginia,* 19 U.S. 264, 394-395 (1821), and *Marbury v. Madison,* 5 U.S. at 163-164.

"[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation." *Battaglia v. General Motors Corporation,* 169 F.2d 254, 257 (2d Cir. 1948). Neither may Congress forbid judicial review of administrative action when fundamental constitutional rights are at stake. *Estep v. United States,* 327 U.S. 114 (1946). "When dealing with Constitutional rights . . . there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it." *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38, 77 (1936) (Brandeis, J., concurring).

In the words of one recent commentator, "Congress can withdraw jurisdiction from all cases except those in which a particular outcome is mandated by the Constitution." T. Eisenberg, *Congressional Authority to Restrict Lower*

Federal Court Jurisdiction," 83 Yale Law Journal 498, 527-28 (1974); also *Lynch v. Household Finance Corp.*, 372 U.S. 391 (1972). No federal law can be constitutional to the extent that it would preclude the enforcement of specific constitutional rights.

If judicial review of legislation is to have any efficacy, courts must be able to accord the victims of abuse the full measure of relief. A law that is unconstitutional as a whole must be rendered inoperative as a whole, otherwise the courts indirectly affirm and execute part of it. If a law unconstitutionally deprives persons of liberty or property, the courts should not be satisfied to declare it void only as to a single class of persons, or as to part of the liberty or property taken. It would be insufficient to remit a prisoner held in violation of the Sixth Amendment from only half of his term, or to restore to a landowner deprived of his property in violation of the Fifth Amendment only half of his property.

This Court has never held otherwise. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), and *Davis v. Passman*, 442 U.S. 228, 245-47 (1979), relied upon by the Court of Appeals, involved plaintiffs seeking money damages for torts committed by federal employees. In neither case had Congress commanded that something be done in excess of constitutional limits, and in neither case was the wrong on-going. Congress may prescribe a different but "equally effective" procedure for adjudication of compensation claims against individual employees, but this is different from legislating that an entire class of persons must accept Treasury checks in lieu of their religious and civil rights.

The power of federal eminent domain is limited by the Fifth Amendment to takings for public purposes. "Some public benefit or advantage must accrue from the transfer

and mere financial gain to the taker is not enough." *People of Puerto Rico v. Eastern Sugar Associates,* 156 F.2d 316 (1st Cir. 1946), *cert. den.* 329 U.S. 772; *Brown v. United States,* 263 U.S. 78, 83-84 (1923). Private profit may be "incidental to a legitimate exercise of the condemnation power but not its principal object." *Swan Lake Hunting Club v. United States,* 381 F.2d 238 (5th Cir. 1967). "The nature of a use, whether public or private, is ultimately a judicial question," and not one predisposed by the legislation itself. *Ringe Co. v. County of Los Angeles,* 262 U.S. 700, 705 (1923).

Petitioner's property was taken with the express purpose of private gain, and was little more than Congressional approval of confessed trespass and theft by United States citizens. How ratification of a conceded act of private theft ever can be deemed a "public" benefit by constitutional courts is a mystery to the petitioner.

The victims of this particular taking are a protected class under the Fourteenth Amendment. "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney,* 99 S.Ct. 2282, 2292 (1979); also *Fullilove v. Klutznick,* 100 S.Ct. 2758, 2776 (1980). The 1877 Act confiscated property from Indians and donated it to individual non-Indians. It is difficult to imagine a plainer example of an impermissible legislative classification.

The 1877 act also violated petitioner's First Amendment right to the free exercise of religion. The lands confiscated long had been known to non-Indians as the holy land of the Sioux and Cheyenne peoples, serving them for thousands of years as church, cemetary, and ceremonial ground. If Congress somehow had condemned Jerusalem

and donated the city to real estate developers, the effect on Christians, Jews and Moslems would have been much the same. Government may not "take away a person's property because it does not approve of what that person believes in or teaches by way of religion or philosophy of life." *Koyohara Jinsha v. McGrath,* 90 F.Supp. 892, 897 (D.Hawaii 1950). Nor may government, even in the otherwise legitimate exercise of the power of eminent domain, unreasonably restrict the free exercise of religion by any group. *Pillar of Fire v. Denver Urban Renewal Authority,* 509 P.2d 1250, 1252-53 (Colo. 1973).

Courts have intervened aggressively and consistently to strike down laws abridging the free exercise, not only of "major" religions, but of all sincere and genuine sects and creeds. *E.g., Sherbert v. Verner,* 374 U.S. 398 (1963), and *People v. Woody,* 394 P.2d 813 (Cal. 1964). Respondents do not contend that petitioner's religion is not entitled to First Amendment protection. It meets every test of *Wisconsin v. Yoder,* 406 U.S. 205, 235 (1972), *viz.* "the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role which belief and daily conduct play in the continued survival of [their] communities and their religious organization." Nor do respondents contend that access to the land at issue is not essential to the exercise of petitioner's religion. Had the sincerity of petitioner's beliefs, or the central nature of the land to petitioner's religion been denied by respondents, petitioner at least would be entitled to trial of these facts. They should not be assumed away *sub silentio,* as the Court of Appeals has done. The plausible allegation that a fundamental civil right is at stake should be sufficient to vest federal jurisdiction, even if there is a possibility that the right will not be proved at trial. Yet the Court of Appeals' opinion does not even acknowledge that First Amendment rights were claimed here.

2. THE DECISION BELOW JEOPARDIZES THAT SYSTEM OF CHECKS AND BALANCES WHICH IS ESSENTIAL TO THE ENFORCEMENT OF ALL CONSTITUTIONAL RIGHTS.

The proposition that Congress may by legislation excuse itself from the commission of an *ultra vires* act by paying compensation to persons deprived of their civil rights is novel and dangerous. The Court of Appeals simply states that money damages are "sufficient" to remedy the wrongs done to petitioner, but its statement is supported by no findings of fact. Nor could it be, for there has been no answer to petitioner's complaint and no trial. This is irreconcilable with the long-standing principle that the adequacy of a remedy is a question of fact for the courts and cannot be predisposed by legislation. *Williams v. United States,* 289 U.S. 552 (1933); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893).

The Court of Appeals' approach to constitutional adjudication renders the Bill of Rights nugatory. If Congress can abridge the freedom of speech, or of religion, or abolish the right of speedy trial, upon payment of damages to citizens injured thereby, our entire constitutional framework is destroyed. The First Amendment does not say, "Congress may make laws abridging the freedom of speech, provided it make sufficient compensation therefor." It says, "Congress *shall make no law . . .*" [emphasis supplied]. The command is absolute. To infer a power to purchase away any impairment, is to degrade these civil and political rights into mere privileges for the time being. It was the wisdom of the framers of the Constitution that certain rights be reserved to the people absolutely, precisely because of their essential and noncompensable nature. No sum of money reasonably can substitute for the right to dissent, or the right of privacy,

or the right to worship according to the dictates of one's conscience.

The Court of Appeals' reasoning would permit Congress to abolish the right of public prayer, establishing a fund of so many millions of dollars to compensate frustrated worshippers and declaring that this shall be an adequate and exclusive remedy. Or Congress might abolish the right of *habeas corpus* or of speedy trial, and provide that anyone wrongfully confined, or not tried within so many months, receive a Treasury check for so many dollars. Congress might even abolish the free exercise of religion, or the right of *habeas corpus,* for only a particular racial, ethnic or national group. Perhaps such a law would strip only Catholics of the right to worship, or only blacks of the right to procedural due process in criminal trials. Such laws could not be constitutional merely because they provided for money compensation.

The Court of Appeals failed to distinguish between a taking of property that is constitutional but for the failure of the government to pay just compensation, and one that lacks a constitutionally permissible purpose. In the former case the payment of compensation would suffice, although it would remain for the courts to determine, as a matter of fact in each case, whether the compensation paid was adequately "just." *Williams v. United States, supra; Monongahela Navigation Co., supra.* In the latter case, however, the duty of courts is not to assure payment, but to enjoin a subversion of the Constitution. Whenever land is taken by the national authority, it is the condemnee's right to challenge the purpose for which it is taken. If land be taken by Congress for the execution of powers prohibited to it, or reserved to the states, the taking is void and the condemnee retains title. If Congress were to take all the lands of Blacks in a place and donate them to

neighboring Whites, on the pretense of alleviating jealousy and conflict, surely there would be substantive constitutional issues ripe for federal judicial review other than whether compensation was paid.

The issue at the heart of the present proceeding is whether Congress has power to satisfy lawbreakers by dismantling the church of their victims. There is little in law to distinguish this case from one in which, for example, Congress chose to appease marauding neo-fascist demonstrators in a suburban neighborhood by giving them their victims' synagogues; the judicial inquiry dare not end with whether money compensation has been tendered. If there is any distinction between that hypothetical case and this one, it lies in the race or nationality of the victims, and that should never be a legitimate constitutional distinction.

The Indian Claims Commission Act does not really even compensate Indian tribal claimants. In accordance with Public Law 92-134 (87 Stat. 466), 25 U.S.C. § 1401 *et seq.*, any damages awarded by the Commission can be spent *only as directed by the Secretary of the Interior.* Hence even if money were adequate compensation for the loss of religious freedom, which petitioner emphatically denies, it is fanciful to treat payment to a federal officer as payment to petitioner. Petitioner doubts this Court would uphold legislation providing that the awards of the Court of Claims under the Federal Tort Claims Act be disbursed at the discretion of the President, upon application of the successful claimants. Such a law would diminish, if not destroy the money value of awards, and they therefore could not be "just" in the constitutional sense of the word. The Indian Claims Commission process is pervasively unconstitutional, then, as applied to claims of the nature involved here.

A remedy moreover cannot be adequate or effective if it does not exist. The Court of Appeals concedes that the Indian Claims Commission was dissolved in 1978 by Public Law 94-465, 90 Stat. 1990. Appendix A, page 7a, n.10, Court of Appeals' opinion. Its opinion is *non sequitur,* for it would send petitioner back to a forum that no longer exists and call that an "exclusive and effective" remedy. Nor is it an answer that petitioner could have prosecuted its claims before the Commission's mandate expired, but failed to do so. The Indian Claims Commission Act presented petitioner with an unconstitutional choice: either to try its claims against the United States under the severe disability of restriction to money damages, or to risk losing them altogether. Petitioner properly chose to seek the full measure of relief the constitution affords.

Petitioner does not suggest that the Indian Claims Commission Act is entirely void, but only that it may not be construed to preclude judicial review of an allegedly *ultra vires* legislative action. Petitioner believes that that act was intended solely to create a special cause of action for essentially contractual claims, *i.e.,* in cases where tribes sold land and complained either that the agreed consideration had never been fully paid, or that the agreed consideration was unconscionable. *Senate Report* 93-167, 93rd Congress, 1st Session (1973), at 1; *Creation of Indian Claims Commission, Hearing, House Committee on Indian Affairs,* 79th Congress, 1st Session (1945), at 69; *Alaska Native Land Claims, Hearing, Senate Committee on Interior and Insular Affairs,* 92nd Congress, 1st Session (1971), at 363. Congress assumed that all tribal land had been sold voluntarily and did not contemplate claims such as petitioner's.

Section 26 of the Indian Claims Commission Act provides that if "any provision of this Act, or the application thereof, is held invalid, the remainder of the Act, or other application of such provisions shall not be affected." Petitioner challenges one application of that act. Contractual claims already adjudicated and paid need not be affected, nor need this Court's decision to accord petitioner the relief it has sought by peaceable process for more than a century necessarily disturb the finality of the Indian Claims Commission process. On the contrary, failure to reverse the Court of Appeals novel interpretation of judicial review will shake the permanence and enforceability of the civil rights of all Americans.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1878

The Oglala Sioux Tribe of The Pine Ridge Indian Reservation,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the District of South Dakota
United States of America; Cecil D. Andrus, in his official capacity as Secretary of the Interior; Bob Bergland, in his official capacity as Secretary of Agriculture; Curtis S. McKee; and State of South Dakota,	*	
Appellees.	*	

Submitted: March 9, 1981

Filed: June 1, 1981

Before GIBSON, Senior Circuit Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

The Oglala Sioux Tribe of the Pine Ridge Indian Reservation (the Oglala Tribe) brought this action against the United States and the State of South Dakota[1] to quiet title to the Black Hills of South Dakota, alleging an unconstitutional taking under the fifth amendment. The district court[2] dismissed the suit for lack of jurisdiction. The Oglala Tribe now appeals from that judgment. We conclude that Congress, by enacting the Indian Claims Commission Act, established the exclusive remedy for the Oglala's claim under the fifth amendment. Thus, the district court did not have jurisdiction to entertain the suit. We therefore affirm the dismissal.

I. Background

In *United States v. Sioux Nation of Indians*, ____U.S.____, 100 S.Ct. 2716 (1980) (*Sioux Nation*), Justice Blackmun detailed the factual setting and chronology of the century-old controversy between the United States and the Sioux Nation over the Black Hills. The complaint in this action refers to the historical facts as related in *Sioux Nation*.

In the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, the United States promised the Sioux Nation[3] that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use

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[1]The Oglala Tribe also named as defendants the Secretaries of Agriculture and the Interior, several South Dakota counties and municipalities, and various individual corporate record owners of the Black Hills.

[2]The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, sitting by designation.

[3]The Sioux Nation consists of approximately six to nine tribes in the Black Hills area. The Oglala Tribe is recognized as a major tribe of the Sioux Nation.

and occupation of the Indians herein named[.]" 15 Stat. at 636. The Fort Laramie Treaty also provided:

> No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same[.] [15 Stat. at 639.]

Within a decade, however, the United States abandoned its treaty obligation with the Sioux Nation by passing the Act of February 28, 1877, 19 Stat. 254. That Act abrogated the Fort Laramie Treaty and ratified an agreement made by ten percent of the adult male Sioux population to cede the Black Hills to the United States in exchange for subsistence rations.

After nearly sixty years of litigation,[4] the Supreme Court in *Sioux Nation* held that the 1877 Act constituted

[4] In 1923, the Sioux Nation filed a petition with the Court of Claims. The court determined that the just compensation clause of the fifth amendment did not support the Sioux' claim. *See Sioux Tribe of Indians v. United States,* 97 Ct. Cl. 613 (1942), *cert. denied,* 318 U.S. 789 (1943). In 1950, the Sioux submitted their Black Hills claim to the Indian Claims Commission, established by Congress in 1946 to adjudicate Indian treaty claims accruing before 1946. *See* Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.* (1976). The Commission awarded the Sioux just compensation under the fifth amendment. *See Sioux Nation of Indians v. United States,* 33 Ind. Cl. Comm'n 151 (1974). The Court of Claims reversed, holding that its previous decision barred a relitigation of the fifth amendment just compensation claim. *See United States v. Sioux Nation of Indians,* 207 Ct. Cl. 234, 518 F.2d 1298 (1975). After Congress passed a statute removing the defense of res judicata to this action, *see* Pub. L. 95-243 92 Stat. 153, amending § 20(b) of the Indian Claims Commission Act, 25 U.S.C. § 70s(b) (Supp. II 1978), the Court of Claims affirmed the Commission's award. *See Sioux Nation of Indians v. United States,* 601 F.2d 1157 (Ct. Cl. 1979), *aff'd,* ____U.S.____, 100 S.Ct. 2716 (1980).

an unconstitutional taking under the just compensation clause of the fifth amendment and affirmed the Indian Claims Commission's award of $17.1 million, plus interest at the annual rate of five percent, dating from 1877.

On July 18, 1980, the Oglala Tribe filed the present action, alleging that the United States, in taking the Black Hills in 1877, unconstitutionally exercised its power of eminent domain. The complaint asserted that the 1877 taking violated the fifth amendment in that the land was taken for a private rather than a public purpose.[5] The Oglala Tribe premised the district court's jurisdiction on 28 U.S.C. §§ 1346(a)(2), 1362, 2409a and 1331(a). The Oglala's complaint sought restoration of the Tribe's territorial rights to the Black Hills, as well as damages resulting from waste, severance of minerals, and wrongful exclusion from the territory. The Oglala also moved for a temporary restraining order to prevent the United States from tendering payment to the Oglala Tribe of any part of the *Sioux Nation* award.[6]

On the appellees' motion,[7] the district court dismissed the complaint against the United States for lack of

[5] In alleging a fifth amendment violation, the appellant's complaint also asserted that the territory seized was not subject to the laws of the United States at the time of the taking; the Oglala Tribe was not afforded due process of law to contest the constitutionality of the taking or the adequacy of the compensation; and no compensation has been paid for the taking.

[6] The Oglala Tribe contends that counsel for the Sioux Nation did not receive authority from the Tribe to appeal on the Oglala's behalf and therefore the decision in *Sioux nation* does not bar the present action.

[7] The appellees requested the dismissal for lack of jurisdiction, contending that (1) none of the statutes relied upon by Oglala provided the requisite waiver of the sovereign immunity of the United States; and (2) Congress established an exclusive remedy for this type of claim under the Indian Claims Commission Act.

jurisdiction, concluding that none of the statutes relied upon by Oglala waived the sovereign immunity of the United States. The court then dismissed the action against the remaining defendants, concluding that the United States was an indispensable party.

II. Discussion.

We agree that the district court properly dismissed this action for lack of jurisdiction. We conclude that Congress has deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy for the alleged wrongful taking through the enactment of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.* (1976). This express action of Congress serves as a bar to the district court affording the Tribe any other form of relief.[8]

For the purpose of this appeal, we assume an implied right of action under the fifth amendment for the alleged wrongful taking. In *United States v. Lee,* 106 U.S. 196 (1882), the Supreme Court recognized a private cause of action under the fifth amendment to repossess land purchased by the United States at an allegedly fraudulent tax

[8] In light of this holding, we need not consider appellant's contentions that §§ 1362, 2409a and 1331(a) of Title 28 provide the requisite waiver of sovereign imunity; that actions under the fifth amendment do not require an express waiver of sovereign immunity; and that the United States is not an indispensable party. We also do not consider appellees' contentions that the doctrines of res judicata, collateral estoppel, and laches bar the present action.

sale.[9] *See also Jacobs v. United States*, 290 U.S. 13 (1933) (allowing suit for just compensation directly under the fifth amendment).

An implied cause of action under the Constitution may be defeated, however, by a showing that

> Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective, *Bivens*, [403 U.S. 388,] 397 [1971]; *Davis v. Passman*, 442 U.S. [228,] 245-247 [1979]. [*Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis in original).]

As recognized by the district court, the Indian Claims Commission Act constitutes such an exclusive remedy.

In 1946, Congress established the Indian Claims Commission to hear all Indian claims accruing before 1946, including "claims in law or equity arising under the Constitution[.]" 25 U.S.C. § 70a(1) (1976). Section 70k of the Act specifically provides:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be

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[9] In *Lee*, no statutory remedy for just compensation was available to the plaintiff. *See Malone v. Bowdoin*, 369 U.S. 643, 647 n.8 (1962); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 697 n.17 (1949) (both cases explaining *Lee*'s rationale as the absence of any remedy for just compensation).

The Supreme Court in recent years has not considered *Lee*'s holding that a cause of action to quiet title may be brought directly under the fifth amendment. Its rationale, however, has been cited with approval. *See United States v. Clarke*, 445 U.S. 253, 255-56 n.2 (1980); *Butz v. Economou*, 438 U.S. 478, 490-91 (1978); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-95 (1971).

> submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress. [25 U.S.C. § 70k]

This precise statutory language reflects Congress' intention to provide a one-time, exclusive forum for the resolution of Indian treaty claims.[10] *See Temoak Band of Western Shoshone Indians, Nevada v. United States,* 593 F.2d 994, 998 (Ct. Cl. 1979); *Six Nations Confederacy v. Andrus,* 610 F.2d 996, 998 (D.C. Cir. 1979).

We conclude that the Oglala's cause of action, as an Indian claim accruing before 1946 and arising under the constitution, comes within this exclusive jurisdiction of the Indian Claims Commission.[11] Accordingly, the district court correctly held that it lacked jurisdiction over Oglala's claim. We affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[10]On September 30, 1978, the Indian Claims Commission was dissolved and its undecided cases were transferred to the Court of Claims. Act of October 8, 1976, Pub. L. No. 94-465, 90 Stat. 1990, *as amended by* the Act of July 20, 1977, Pub. L. No. 95-69, 91 Stat. 273.

[11]The Indian Claims Commission confined its jurisdiction, however, to claims for money damages. *See Osage Nation of Indians v. United States,* 1 Ind. Cl. Comm'n 54 (1948), *rev'd on other grounds,* 119 Ct. Cl. 592, 97 F. Supp. 381, *cert. denied,* 342 U.S. 896 (1951). The Oglala Tribe now contends that Congress cannot constitutionally limit the Oglala's remedy to money damages for an unconstitutional taking under the fifth amendment. We must reject this contention as the Indian Claims Commission Act provided an effective remedy for Oglala's constitutional claim. *See generally Carlson v. Green, supra,* 446 U.S. at 18-19.

APPENDIX B
JUDGMENT

FILED
August 28, 1981
William F. Clayton
Jr. Clerk

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 80-1878 **September Term, 1980**

The Oglala Sioux Tribe of the Pine Ridge Indian Reservation,

Appellant,

vs.

United States of America; Cecil D. Andrus, in his official capacity as Secretary of the Interior; Bob Bergland, in his official capacity as Secretary of Agriculture,

Appellee.

and

Curtis S. McKee,

Appellee

and

State of South Dakota,

Appellee.

Appeal from the United States District Court for the District of South Dakota.

This cause was heard on a designated record from the United States District Court for the District of South Dakota and on brief of the respective parties and was argued by counsel.

After consideration, it is now ordered and adjudged that the judgment of the said District Court in this cause

be, and the same is hereby, affirmed in accordance with the opinion of this Court.

Costs taxed in favor of Appellee, Curtis S. McKee: June 1, 1981

Costs of reproducing five copies of brief: $57.50

Total costs of Appellee, Curtis S. McKee, for recovery from Appellant in the U.S. District Court: $57.50

UNITED STATES OF AMERICA
DISTRICT OF SOUTH DAKOTA

I, WILLIAM F. CLAYTON, Clerk of the United States District Court for the District of South Dakota, hereby certify that the above and foregoing is a true copy of the original now on file in my office.

Dated this 25th day of August 1981.

WILLIAM F. CLAYTON, Clerk

By _____
Deputy

A true copy: /s/ Robert D. St. Vrain

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit 8/12/81

APPENDIX C

IN THE
UNITED STATES COURT
UNITED STATES DISTRICT COURT
WESTERN DIVISION
CIV. 80-5-062

THE OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

MEMORANDUM OPINION

In this action, the Oglala Sioux Tribe of the Pine Ridge Indian Reservation seeks to quite title to certain land, commonly referred to as the Black Hills, which the Oglala allege was confiscated unlawfully and unconstitutionally by the United States in 1877. Damages for trespass and waste are also sought, as is injunctive relief. This matter is presently before the Court on the plaintiff's motion for a temporary restraining order to prevent the United States from tendering payment to the Oglala of any part of the award in *United States v. Sioux Nation of Indians,* ____ U.S. ____, 100 S.Ct. 2716 (June 30, 1980).[1] The United

[1]According to expert testimony presented by the United States, the Sioux Nation is composed of six to nine tribes in the Black Hills area. The Oglala Sioux Tribe is recognized as a major tribe of the Sioux Nation.

States opposes the motion for a temporary restraining order and moves to dismiss the action for lack of jurisdiction. On August 13, 1980, a hearing was held at which the plaintiff and the United States were represented and briefs were submitted.

BACKGROUND

The facts surrounding the Black Hills controversy have been the subject of frequent and extensive litigation and were most recently restated in *United States v. Sioux Nation of Indians,* ____U.S. ____, 100 S.Ct. 2716 (June 30, 1980). A brief summary of that background follows. In the Treaty of April 29, 1868, also known as the Fort Laramie Treaty, the United States "agreed to set apart for the absolute and undisturbed use" of the Sioux Nation the Great Sioux Reservation, which included the Black Hills. The Fort Laramie Treaty also provided that no future treaty for the cession of any part of the reservation would be valid unless signed by at least three-quarters of the adult male Sioux population. Following glowing reports in 1874 of the vast natural resources of the Black Hills, popular demand grew for the opening of the Hills for settlement. In 1876, a commission appointed by the President negotiated an agreement, signed by ten percent of the adult male Sioux population, in which the Sioux ceded to the United States the Black Hills portion of their reservation and the United States promised subsistence rations for as long as would be needed by the Sioux. As the agreement did not satisfy the requirement of the Fort Laramie Treaty that no cession of territory could be made without the written approval of three-quarters of the adult males, Congress "resolved the impasse" by passing the Act of February 28, 1877, 19 Stat. 254. The Act of 1877 abrogated the Fort Laramie Treaty and implemented the terms of the above agreement.

Since its passage, the Sioux have regarded the Act of 1877 as a breach of the United States' obligation to reserve the Hills for the exclusive use of the Sioux. Until a special jurisdictional act, Act of June 3, 1920, 41 Stat. 738, was passed, however, the Sioux were without a forum in which to litigate their claims against the United States.[2] Pursuant to the above statute, the Sioux filed a petition in the Court of Claims seeking just compensation for the alleged taking in 1877 of their lands. In 1942 the Court of Claims held that the Sioux had not established a taking in violation of the Fifth Amendment and that the Court had no authority to inquire into the adequacy of the intended consideration. *Sioux Tribe v. United States,* 97 Ct.Cl. 613 (1942), *cert. denied,* 318 U.S. 789 (1943) *("Sioux Nation I").*

In 1946, Congress passed the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70, *et seq.,* which created an Indian Claims Commission to hear and determine all pending Indian claims. The Sioux resubmitted the Black Hills claim to the Indian Claims Commission and, after extensive proceedings, the Commission held in 1974 that Congress had not made a good faith effort to give the Sioux the full value of the Black Hills, that Congress had acted pursuant to its powers of eminent domain when it passed the Act of 1877, and that the Sioux were entitled to just compensation, including simple interest at five per cent, for the taking of the Black Hills. *Sioux Nation v. United States,* 33 Ind.Cl.Comm 151 (1974). On appeal, the Court of Claims held that the merits of the Sioux's Fifth Amendment taking claim had been decided in its 1942 decision and was now barred by the doctrine of *res*

[2]By Act of March 3, 1863, 12 Stat. 765, 767, Court of Claims' jurisdiction was withdrawn over claims growing out of any treaty with "foreign nations or with the Indian tribes." Absent a special act of Congress, Indians were thus unable to litigate such claims.

judicata. In addition to claims based on the Constitution, however, the Indian Claims Commission Act also permitted claims based on dishonorable dealings. The Court of Claims affirmed an award for the Sioux on that basis, but without interest as the Indian Claims Commission Act did not provide therefor. *United States v. Sioux Nation,* 207 Ct.Cl. 234, 518 F.2d 1298, *cert. denied,* 423 U.S. 1016 (1975) (*"Sioux Nation II"*).

On March 13, 1978, Congress enacted a statute providing for Court of Claims review of the merits of the Indian Claims Commission's determination in 1974 that the Act of 1877 effected a taking of the Black Hills, without regard to the defense of *res judicata* or collateral estoppel. 92 Stat. 153, 25 U.S.C. § 70s(b). Pursuant to that statute an application for review was filed and the Court of Claims affirmed the Commission's holding that the Act of 1877 effected a taking of the Black Hills and that the Sioux were entitled to just compensation of $17.1 million, plus interest at five per cent dating from 1877. *Sioux Nation v. United States,* 220 Ct.Cl. _____, 601 F.2d 1157 (1979). On certiorari to the Supreme Court, the judgment of the Court of Claims was affirmed. *United States v. Sioux Nation of Indians,* ____ U.S. ____, 100 S.Ct. 2716 (June 30, 1980) (*"Sioux Nation III"*).

PRESENT ACTION

The present action was filed on July 18, 1980, and an amended complaint was filed on August 1, 1980, along with the instant motion for a temporary restraining order. The Oglala Sioux allege that by the Act of 1877, Congress unlawfully and unconstitutionally confiscated the Black Hills, and in this action seek to quiet title to the Black Hills in the Oglala Sioux, seek damages for waste, severance of minerals and wrongful exclusion from the use of this ter-

ritory for religious and subsistence purposes, and seek to enjoin the United States from tendering payment to the Oglala Sioux of any part of the award in *Sioux Nation III*. The Oglala Sioux Tribe alleges that it is not bound by *Sioux Nation III* because counsel for the Sioux Nation of Indians had no authority from the Oglala Sioux Tribe to institute that action or appear on its behalf.[3] As already noted, the Sioux Nation of Indians encompasses six to nine tribes in the Black Hills area, one of which is the Oglala Sioux Tribe.

The lead counsel for the Sioux Nation in *Sioux Nation III* was Arthur Lazarus, Jr. Mr. Lazarus is a claims attorney for a number of the Sioux Tribes and was a claims attorney for the Oglala Sioux until May of 1977, when his contract with the Oglala expired. The Oglala maintain that despite Mr. Lazarus' request, his contract was not renewed and also contend that Mr. Lazarus was aware that the Oglala intended to seek the return of the Black Hills rather than compensation therefor. It appears that Mr. Lazarus' contract with the Oglala expired approximately a year before *Sioux Nation III* was filed in the Court of Claims. Evidence has been submitted showing that a letter was written to the Supreme Court informing it that Mr. Lazarus was without authority to represent the Oglala, and on July 29, 1980, the Oglala filed a motion in the Court of Claims for leave to file a motion to stay the judgment of *Sioux Nation III*. The Clerk of the Court of Claims declined to file the Oglala Tribe's motion on the

[3]The issue of whether the Oglala are barred by principles of *res judicata* from litigating claims or issues decided in *Sioux Nation I* or II has not been raised. Although the Court of Claims was granted jurisdiction to review the merits of the Black Hills claims without regard to the defense of *res judicata* or collateral estoppel, Act of March 13, 1978, 92 Stat. 153, 25 U.S.C. § 70s(b) this Court would, of course, have to consider such defenses.

basis that the Court of Claims no longer had jurisdiction over the case.

The Oglala move for a temporary restraining order to prevent the United States from tendering any part of the award in *Sioux Nation III* to the Oglala because the "payment" of such an award ordinarily would bar any further action against the United States arising out of the same facts, including presumably the instant action. *See* 25 U.S.C. § 70u; 28 U.S.C. § 2517(b); 28 U.S.C. § 2519. On July 22, 1980, the judgment of the Court of Claims as affirmed by the United States Supreme Court was certified for payment by the General Accounting Office. On July 23, 1980, funds in the amount of the judgment were withdrawn from the Treasury Department and paid to the Department of the Interior, Bureau of Indian Affairs. By statute, 25 U.S.C. § 1401-07, the Secretary of the Interior is obliged to develop a plan for the use or distribution of the funds. This plan is then submitted to Congress, and becomes effective within sixty days unless Congress adopts a resolution disapproving the plan. According to expert testimony presented by the United States, the award in *Sioux Nation III* is not likely to be actually distributed to the entitled individuals for at least four years.

In response to the Oglala's motion for a temporary restraining order, the United States argues that this Court is without jurisdiction to hear this action, that a federal district court is without authority to review or restrain a mandate of the United States Supreme Court and that, assuming jurisdiction, the balance of the hardships in this case does not decidedly favor the plaintiff. Since the Court concludes that it is without jurisdiction to entertain this action, it reaches only that issue.

JURISDICTION

In its amended complaint, the Oglala Sioux Tribe premises jurisdiction for this action on Sections 1346(a)(2), 1362, 2409a and 1331(a) of Title 28 of the United States Code. As stated in *Bor-Son Building Corp. v. Heller,* 572 F.2d 174, 177 (8th Cir. 1978), "[i]t is fundamental that the United States, as sovereign, is immune from suit save as it consents to be sued and that the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." For the reasons that follow, the Court concludes that none of the statutes relied upon by the plaintiff permit suit to be maintained against the United States in this action.

Section 1346(a)(2) of the Tucker Act grants jurisdiction to the district courts, concurrent with the Court of Claims, of any civil action against the United States "not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress in cases not sounding in tort." As is apparent from the face of the complaint, the plaintiff's prayer for money damages against the United States far exceeds $10,000 in amount. Furthermore, the Oglala Tribe's claim for damages is incidental to their primary action to quiet title. It has long been settled that the jurisdiction of a district court under Section 1346(a)(2) is limited to actions for money damages and does not include suits for equitable relief. *See, Werner v. United States Department of Interior, Fish & Wildlife,* 581 F.2d 168, 171 (8th Cir. 1978); 14 Wright and Miller, *Federal Practice and Procedure* §3657 at 216 (1976). This provision of the Tucker Act, therefore, provides no jurisdiction under the circumstances of this action for either the monetary or equitable relief sought by the Oglala Tribe.[4]

[4]28 U.S.C. § 1346(f) does provide for exclusive jurisdiction in the district courts of civil actions under Section 2409a to quiet title to real property in which an interest is claimed by the United States. 28 U.S.C. § 2409a is discussed *infra.*

Section 1362 of Title 28 provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe * * * wherein the matter in controversy arises under the Constitution, laws or treaties of the United States." As conceded by the plaintiff at oral argument, this statute has not been read as a waiver of sovereign immunity. The purposes of Section 1362 were to eliminate the jurisdictional amount requirement of 28 U.S.C. § 1331 for actions brought by Indian tribes and to allow Indian tribes to bring suit in federal court when the United States, as trustee, has failed to initiate suit on their behalf. *Scholder v. United States,* 428 F.2d 1123, 1125 (9th Cir.), *cert. denied,* 400 U.S. 942 (1970); *Standing Rock Sioux Indian Tribe v. Dorgan,* 505 F.2d 1135, 1140 (8th Cir. 1974); H.R. Rep. No. 2040, 89th Cong., 1st Sess., *reprinted in* [1966] U.S. Code Cong. & Admin. News 3145. Section 1362, therefore, does not by its terms allow this suit to be maintained against the United States.

The third statute cited by the plaintiff, 28 U.S.C. § 2409a, permits the United States to be made a party to actions in the district courts to quiet title to lands in which the United States claims an interest. As observed in the legislative history to 2409a, prior to the passage of this provision the doctrine of sovereign immunity precluded suits to quiet title in which the United States could be joined as a defendant. H.R. Rep. No. 92-1559, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Admin. News 4547, 4551. Section 2409a now permits the United States to be named as a defendant in quiet title suits, but if the judgment is adverse to the United States, it may elect either to return the property to the claimant or to pay money damages. 28 U.S.C. § 2409a(b). Furthermore, Section 2409a(f) provides:

> Any civil action under this section shall be barred

> unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of United States.

Without going beyond the face of plaintiff's complaint, it is apparent that the instant action was not commenced within twelve years of the date, 1877, the plaintiff knew of the claim of the United States. Assuming that Section 2409a is applicable to the instant action, the statute of limitations contained in that provision has clearly run and bars any action brought pursuant to it. As applied to the United States, the defense of the statute of limitations goes to the Court's jurisdiction, and Section 2409a(f) has been construed as such a jurisdictional statute of limitations. *Gross v. Andrus,* 556 F.2d 972, 975 (9th Cir. 1977).

The Oglala place primary reliance on 28 U.S.C. § 1331(a), the general grant of federal question jurisdiction to the courts. Two issues which must be addressed before jurisdiction can be premised on that statute, however, are whether the United States has consented to suit in this court and whether another statute has expressly or impliedly forbid the relief which is presently sought. In regard to the first question, Section 1331(a) itself has not been construed as a waiver of sovereign immunity. *Donohue v. United States,* 437 F.Supp. 836, 841 (E.D.Mich. 1977); 14 Wright and Miller, *Federal Practice and Procedure,* Section 3655 at 16 (Supp. 1979). In answer to this contention, the Oglala suggest that the 1976 amendments to 28 U.S.C. § 1331(a) and 5 U.S.C. § 702 establish the United States' consent to suit in this action. By the Act of October 21, 1976, (90 Stat. 2721), 28 U.S.C. § 1331(a) was amended to eliminate the $10,000 jurisdictional amount requirement in suits against the United States, and

5 U.S.C. § 702 was amended to remove the defense of sovereign immunity as a bar to judicial review of federal administrative action in suits for specific relief. As the waiver of sovereign immunity is an amendment to 5 U.S.C. § 702, however, it is applicable only to a review of "agency" action. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News 6121, 6131. As provided in 5 U.S.C. § 701(b)(1)(A), the definition of agency specifically does not include the Congress. Since the primary action challenged here is the abrogation of the Fort Laramie Treaty by an Act of Congress, Act of February 28, 1877, it appears that 5 U.S.C. § 702 may not be relied upon as a waiver of sovereign immunity in the present case.

Assuming, *arguendo,* that 5 U.S.C. § 702 would otherwise operate as a waiver of sovereign immunity, it would still have to be determined whether another statute has provided an exclusive remedy for the claims asserted in this action. The 1976 amendment to 5 U.S.C. § 702 provides in relevant part that "[n]othing herein * * * (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." As stated in the legislative history to this amendment, "[i]f a statute 'grants consent to suit' with respect to a particular subject matter, specific relief may be obtained only if Congress has not intended that provision for relief to be exclusive." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Adm. News 6121, 6133. In enacting the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70, *et seq.*, Congress appears to have created an exclusive remedy for claims such as those advanced here.

Under the Indian Claims Commission Act, an Indian Claims Commission was established to hear all Indian

claims pending as of the date the Act was passed, August 13, 1946. Section 70a of the Act provides:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking of the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

As reflected in the legislative history to the Indian Claims Commission Act, that Act "would require all pending Indian claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted to this

fact-finding body within five years, and would outlaw claims not so submitted." H.R. Rep. No. 1466, 79th Cong., 2d Sess., *reprinted in* [1946] U.S. Code Cong. Service, 1347, 1349. In order to insure finality, Congress found it "essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims." *Id.* at 1355. The exclusiveness of the remedy provided by the Indian Claims Commission Act is most apparent in Section 70K, which states that "[t]he Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress." Based on the foregoing, this Court holds that the Indian Claims Commission Act established an exclusive remedy for the claims advanced here and thereby precluded the relief which is presently sought in this Court.

Support for this holding is found in *Six Nations Confederacy v. Andrus,* 610 F.2d 996 (D.C.Cir. 1979). In *Six Nations,* the plaintiff alleged that it was the only entity entitled to bring action on behalf of the Six Nations Confederacy, and sought to set aside an Indian Claims Commission award in favor of the Confederacy on the basis that the plaintiff was never properly apprised of the litigation before the Commission and that the Indian Claims Commission Act, in allowing that litigation to proceed in the plaintiff's absence, deprived it of constitutional rights. The Court of Appeals assumed that there was technical federal question jurisdiction, but held that

> [b]ecause Congress enacted a special and exclusive system for determination of claims under the Indian Claims Commission Act, appellant

> could not choose for itself another avenue of relief. Congress had selected the route which had to be followed. It makes no difference that appellant raises constitutional issues. The Commission could consider those, and if it did not the Court of Claims – which is an Article III court, *see Glidden v. Zdanok,* 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962) – certainly could do so on appeal. If that court agreed with appellant, and found no impediment to redress, it could set aside the Commission's determination in No. 84.[5] .

The Oglala contend that the doctrine of "impliedly exclusive statutory remedies" does not apply to the present action because a violation of the Constitution, not merely a breach of law, has been alleged.[6]

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[5]*Six Nations, supra,* 610 F.2d at 998 (citation and footnote omitted). The *Six Nations* court also noted that the Court of Claims has indicated that in proper circumstances, it might entertain an *independent* action under 28 U.S.C. § 1505 to reopen and set aside a judgment over which it had subject matter jurisdiction apart from the bar of *res judicata. Six Nations, supra,* 610 F.2d at 998 n. 4 (*citing Andrade v. United States,* 202 Ct.Cl. 988, 994-96, 485 F.2d 660, 663-64 (1973), *cert. denied,* 419 U.S. 831 (1974)).

[6]The Oglala also contend that if their allegations are true and the United States' taking of the Black Hills in 1877 was void, this caue of action arose when the United States attempted to cure its unconstitutional action through payment in 1980. At a minimum, the Oglala argue, the United States use and occupation of the Black Hills from 1877 to the present has given rise to a continuing cause of action for trespass and to quiet title. To the extent that their cause of action arose after 1946, therefore, the Oglala maintain that the Indian Claims Commission Act is inapplicable. As it is clear, however, that the taking which is the subject matter of the instant suit did occur prior to 1946, and was in fact the basis of a claim submitted under the Indian Claims Commission Act, *Sioux Nation II,* the Court concludes that the present claim was without doubt, a claim existing before passage of the Indian Claims Commission Act in 1946 and consequently a claim within the coverage of that Act.

First, as suggested earlier, a corollary to the doctrine of sovereign immunity is that when the sovereign has consented to suit, it may define the conditions under which that suit may be brought. Second, the Supreme Court has held that sovereign immunity will not bar an action against a federal *officer* if it is claimed either that the defendant acted outside the scope of his authority or that the defendant acted unconstitutionally. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). It is clear, however, that the instant action is not a suit against a federal officer who has acted ultra vires, but specifically a suit to quiet title against the United States. As such, the exceptions to the doctrine of sovereign immunity developed in *Larson, supra,* which under some circumstances permit suit against officers of the government without joining the government as a party defendant, are not applicable.

In sum, the Court concludes that the present suit is a suit against the sovereign, that Congress created a special and exclusive remedy under the Indian Claims Commission Act for the claims raised here, and that accordingly this action cannot be maintained against the United States in this Court. Since the United States is obviously an indispensible party to this litigation, *see* Fed.R.Civ.P. 19, and has not consented to suit in this Court, the action must be dismissed. *See, Stewart v. United States,* 242 F.2d 49, 51 (5th Cir. 1957). A separate order in accordance with this memorandum will be entered dismissing the plaintiff's complaint.

BY THE COURT:

/s/ Albert G. Schatz
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA WESTERN DIVISION

THE OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

FILED
September 11, 1980
William J. Srstka,
Clerk B

CIV. 80-5-062

ORDER

NOTICE OF ENTRY
Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 11th day of Sept. 1980.
/s/ William J. Srstka
Clerk B

Pursuant to the memorandum opinion entered herein this date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's complaint should be and the same is hereby dismissed, each party to pay their own costs.

BY THE COURT:

/s/ Albert G. Schatz
JUDGE, UNITED STATES DISTRICT COURT

ATTEST:

WILLIAM J. SRSTKA, Clerk

By BETTY B. BERRY
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION
Civil No. 80-5062
Amended Complaint

THE OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA; CECIL D. ANDRUS, In His Official Capacity as Secretary of the Interior; BOB BERGLAND, In His Official Capacity as Secretary of Agriculture; THE STATE OF SOUTH DAKOTA; THE COUNTY OF FALL RIVER; THE COUNTY OF PENNINGTON; THE COUNTY OF CUSTER; THE COUNTY OF LAWRENCE; THE COUNTY OF BUTTE; THE COUNTY OF HARDING; THE COUNTY OF MEADE; THE MUNICIPALITY OF RAPID CITY; THE MUNICIPALITY OF SPEARFISH; THE MUNICIPALITY OF DEADWOOD; THE MUNICIPALITY OF HOT SPRINGS; THE MUNICIPALITY OF BUFFALO; THE MUNICIPALITY OF NEWELL; THE MUNICIPALITY OF NEW UNDERWOOD; THE MUNICIPALITY OF CUSTER; THE MUNICIPALITY OF EDGEMONT; LOUIS F. SWIFT, JR.; RUTH K. COLLINS; DELBERT T. CRISMAN; BERT BRADEEN; LLOYD D. CROW; ED SHRINER; NED WESTPHAL; DONALD REED; GORDON FLUKE; ELDON LYTLE; LEONARD WOOD; HENRY PEPIN; GEORGE E. FLAVIN, JR.; STELLA LYNN BUNTROCK; GEORGE T. WRIGHT; ALEX J. RODNEY; THOMAS E. RODGERS; ELVIN E. MITCHELL; MARTIN MAHONEY; ROBERT R. TUDOR; RICHARD L. HOVEY; HARLEY A. SMITH; DAVID E. McFARLAND; INGA GULLIKSON ADAMSKI; ROSS F. JORDAN; JAMES RABY; PHILIP J. ERSCHEN; JOAN MARK; LYDA E. BOWKER; JOHN W. HUNTER; MILDRED CLINE; LUCILLE HARTSHON; DONALD F. BENDT; JAMES J. KLEIN; CURTIS S. McKEE; JAMES A. LEE; GEORGE A. KRUGER; LLOYD E. GIRTON; PHILIP DONAHUE; OAKTON REALTY CO.; FIRST NATIONAL BANK OF THE BLACK HILLS; LITHIUM CORPORATION OF AMERICA; MAYWOOD CHEMICAL CO.; BLACK HILLS KEYSTONE CORPORATION; HOPE ENTERPRISES, INC.; SCHWAHN CORPORATION; MT. PLAINS CORPORATION; BLACK HILLS LIME; HOMESTAKE MINING COMPANY; BLACK HILLS CENTRAL RAILROAD, INC.; BLACK HILLS RESORTS, INC.; ENVIR-A-SEARCH CORPORATION;

FRAWLEY RANCHES, INC.; BARKLEY RANCH, INC.; DONALD PUTNAM RANCH, INC.; STAR CATTLE CO.; CONLON RANCH; 7-11 RANCH; FOOS DAIRY; RITTBERGER BEEF & DAIRY; BLACK HILLS EMPIRE ENTERPRISES; K/S RANCH, INC.; PACER CORPORATION; WARNES APALOOSA & HEREFORD RANCH; MODEL FASHIONS, INC.; NORTHWESTERN ENGINEERING COMPANY; HILLS MATERIAL COMPANY: UNITRAM CORPORATION: MISSION LODGE, INC.; J.C. PENNEY COMPANY and EDGEMONT LUMBER COMPANY, On Their Own Behalf and As Representatives For All Other Persons and Corporate Entities Similarly Situated,

Defendants.

COMPLAINT TO QUIET TITLE, FOR DECLARATORY AND INJUNCTIVE RELIEF, AND FOR DAMAGES

A. Introduction

1. This is an action to quiet title of the Oglala Sioux Tribe to seven million acres, more or less, of its original national territory (Exhibit A), all of which was confiscated unlawfully and unconstitutionally by the United States of America in 1877, and now is in the possesion of the defendants. This action seeks to restore the territoral rights of the Oglala Sioux Tribe to their status had no confiscation occurred, and therefore plaintiff also seeks damages for waste, severance of minerals, and wrongful exclusion from the use of this territory for religious and subsistence purposes.

B. Parties

2. Plaintiff THE OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION is an unincorporated tribe of Indians organized under Section 16 of the Act of June 18, 1934, c. 576, 48 Stat. 984, 25 U.S.C. § 461

et seq. The Oglala Sioux Tribe has an official governing body duly recognized by the Secretary of the Interior.

3. Defendant THE UNITED STATES OF AMERICA claims to have or to have had lawful possession of portions of the territory described in paragraph 16 of this Complaint in accordance with its Constitution, laws and treaties, and pursuant to that claim used, leased, licensed and sold parts of said territory to its citizens and other persons to the injury of plaintiff. It is is sued in its proprietary capacity pursuant to 28 U.S.C. § 1331(a), as amended by the Act of October 21, 1976, 90 Stat. 2721, waiving its immunity from suits seeking declaratory and injunctive relief, and also 28 U.S.C. §§ 1346(a)(2), 1362, and 2409 a.

4. Defendant CECIL D. ANDRUS is the Secretary of the Interior. He is charged by law with the overall administration of the Department of the Interior and agencies thereunder, including the Bureau of Land Management, which bureau is charged with the management of certain federal lands within the area described in paragrah 16.

5. Defendant BOB BERGLAND is the Secretary of Agriculture. He is charged by law with the overall administration of the Department of Agriculture and agencies thereunder, including the United States Forest Service, which agency is charged with the management of certain federal lands within the area described in paragraph 16.

6. Defendant THE STATE OF SOUTH DAKOTA is sued in its proprietary capacity. It claims to have lawful possession of lands within the area described in paragraph 16 pursuant to grants from the United States of America and purchases from the United States or its successors in interest.

7 Defendants THE COUNTY OF FALL RIVER, THE COUNTY OF PENNINGTON, THE COUNTY OF CUSTER, THE COUNTY OF LAWRENCE, THE COUNTY OF BUTTE, THE COUNTY OF HARDING and THE COUNTY OF MEADE are political subdivisions of the State of South Dakota and are sued in their proprietary capacities. They claim to have lawful possession of lands within the area described by paragraph 16.

8. Defendants THE MUNICIPALITY OF RAPID CITY, THE MUNICIPALITY OF SPEARFISH, THE MUNICIPALITY OF DEADWOOD, THE MUNICIPALITY OF HOT SPRINGS, THE MUNICIPALITY OF BUFFALO, THE MUNICIPALITY OF NEWELL, THE MUNICIPALITY OF NEW UNDERWOOD, THE MUNICIPALITY OF CUSTER and THE MUNICIPALITY OF EDGEMONT are political subdivisions of the State of South Dakota and are sued in their proprietary capacities. They represent all municipalities which claim to have lawful possession of lands within the area described in paragraph 16.

9. Defendants LOUIS F. SWIFT, JR., RUTH K. COLLINS, DELBERT T. CRISMAN, BERT BRADEEN, LLOYD D. CROW, ED SHRINER, NED WESTPHAL, DONALD REED, GORDON FLUKE, ELDON LYTLE, LEONARD WOOD, and HENRY PEPIN represent the class of persons who claim to have lawful possession to homestead lands throughout the area described in paragraph 16.

10. Defendants GEORGE E. FLAVIN, JR., STELLA LYNN BUNTROCK, GEORGE T. WRIGHT, ALEX J. RODNEY and THOMAS E. RODGERS represent the class of persons who claim to have lawful possesion of mineral survey lands throughout the area described in paragraph 16.

11. Defendants ELVIN E. MITCHELL, MARTIN MAHONEY, ROBERT R. TUDOR, RICHARD L. HOVEY, HARLEY A. SMITH, DAVID E. McFARLAND, INGA GULLIKSON ADAMSKI, ROSS F. JORDAN, JAMES RABY, PHILLIP J. ERSCHEN, JOAN MARK, LYDA E. BOWKER, JOHN W. HUNTER, MILDRED CLINE, LUCILLE HARTSHON, DONALD SPENCER, TOM NORMAN, PAUL RASMUSSEN, DONALD KNAPP, and WAYNE O'NEILL represent the class of person who claim to have lawful possession of other rural agricultural and residential lands throughout the area described in paragraph 16.

12. Defendants DONALD F. BENDT, JAMES J. KLEIN, CURTIS S. McKEE, JAMES A. LEE, GEORGE A. KRUGER, LLOYD E. GIRTON and PHILLIP DONAHUE represent the class of persons who claim to have lawful possession of townsite and subdivision lots throughout the area described in paragraph 16.

13. Defendants OAKTON REALTY CO., FIRST NATIONAL BANK OF THE BLACK HILLS, LITHIUM CORPORATION OF AMERICA, MAYWOOD CHEMICAL CO., BLACK HILLS KEYSTONE CORPORATION, HOPE ENTERPRISES, INC., SCHWAHN CORPORATION, MT. PLAINS CORPORATION, BLACK HILLS LIME, HOMESTAKE MINING COMPANY, BLACK HILLS CENTRAL RAILROAD, INC., BLACK HILLS RESORTS, INC., and ENVIR-A-SEARCH CORPORATION represent the class of businesses and industries engaged in the use and development of land and natural resources who claim to have lawful possession of lands throughout the area described in paragraph 16.

14. Defendants FRAWLEY RANCHES, INC., BARKLEY RANCH, INC., DONALD PUTNAM

RANCH, INC., STAR CATTLE CO., CONLON RANCH, 7-11 RANCH, FOOS DAIRY, RITTBERGER BEEF & DAIRY, BLACK HILLS EMPIRE ENTREPRISES, K/S RANCH, INC., PACER CORPORATION and WARNES APALOOSA & HEREFORD RANCH represent the class of corporate entities engaging in agriculture which claim to have lawful possession of lands throughout the area described in paragraph 16.

15. Defendants MODEL FASHIONS, INC., NORTHWESTERN ENGINEERING COMPANY, HILLS MATERIAL COMPANY, UNITRAM CORPORATION, MISSION LODGE, INC., J.C. PENNEY COMPANY and EDGEMONT LUMBER COMPANY represent the class of businesses engaged in personal services, wholesaling and retailing who claim to have lawful possession of lands throughout the area described in paragraph 16.

C. STATEMENT OF FACTS

16. From time immemorial, the Oglala Sioux people have occupied the western part of the area described in the Treaty of September 17, 1851, and described more particularly in the Act of February 28, 1877 as lying between 43° and 46° North latitude, and 103° and 104° West longitude, and extending further eastward between and to the confluence of the Belle Fourche and Cheyenne Rivers. Each and every part of this territory was used for and was essential to the subsistence and religious observances of the Oglala Sioux people. No part of this territory ever was sold by the Oglala Sioux Tribe in accordance with its laws and customs.

17. In the Treaty of September 17, 1851, the United States recognized the undiminished right of the Oglala

Sioux Tribe to occupy, use, and govern the territory described in paragraph 16. The Oglala Sioux Tribe did not acknowledge, nor did the United States assert by this treaty that this territory was owned by or constituted a part of the territory or dominion of lthe United States.

18. Unconsented encroachments on the territory of the Oglala Sioux Tribe and of its Sioux allies by citizens of the United States, and attempts by agents of the United States to secure the appearance of sales of these lands through negotiation with individual Sioux in controvention of Sioux law and customs, resulted in war between the United States and the Oglala Sioux Tribe in 1866 and 1867. Peace was concluded at Fort Laramie in the Treaty of April 29, 1868, a mutual demobilization without terms of surrender on either side.

19. By the Treaty of April 29, 1868, the United States acceded to the grievances of the Sioux tribes, pledging to defend them against encroachments, to secure them in the undisturbed use and occupancy of their ancient territory, and, in Article XII, agreeing further that any sale of Sioux land would require the consent of three-fourths of the adult males there resident, compatible with Sioux laws and customs. Article XII was intended to prevent the United States former practice of negotiating with individuals unlawfully holding themselves out as agents of the whole Sioux people, and in consideration of the United States' agreement to this condition, the Oglala Sioux Tribe agreed to remain forever at peace with the citizens of the United States. The Oglala Sioux Tribe has remained at peace with the citizens of the United States from 1868 to this day in accordance with its treaty obligations.

20. By the terms of the Treaty of April 29, 1868, both the United States and the Oglala Sioux Tribe agreed mutually to limit their sovereign powers to cede and to ac-

cept cessions of land, for the protection and future peace of both parties. In form and intent, the treaty was to become entrenched and irrevocable on both sides.

21. Notwithstanding its express obligations under the Treaty of April 29, 1868, the United States permitted and encouraged its citizens to enter, occupy, use, possess, mine, and commit waste on the territory described in paragraph 16 beginning in 1874. Called upon by the Oglala Sioux Tribe to execute the terms of its treaty, the United States instead sought to purchase the Tribe's interest. When the Oglala Sioux Tribe declined to sell, the United States threatened military reprisals and, with the explicit purpose of coercing a sale, withheld food and supplies from Sioux bands attempting to relocate from the contested area.

22. While the majority of the Oglala Sioux people sought peaceful avenues of redress, commissioners of the United States in 1876 coerced the consent of a small number of individual Sioux to a cession of the area described in paragraph 16. With full knowledge that this "agreement" did not satisfy the requirements of Article XII of the Treaty of April 29, 1868, Congress declared the land sold and took possession of it for the benefit of citizens of the United States acting in their private capacities for mining, agriculture, and settlement. No part of the territory purported to have been sold by this means was required for or dedicated to public use or to execute any Constitutional power and duty of the United States, nor was any compensation ever paid to the Oglala Sioux Tribe.

23. By patent, lease, and license the United States has for itself in its proprietary capacity and by its agents and citizens, continued ever since to occupy, use, and possess the territory described in paragraph 16, and in so doing has for the time of one hundred and three years by force

and threat of prosecution deprived the Oglala Sioux people of the benefit, use, and enjoyment of the same for economic, residential, and religious purposes. The United States, for itself and by its agents and citizens, has committed waste by the unauthorized removal of minerals, stone, and timber, and has destroyed irretrievably, by clearing and construction, the utility of the land for many of the purposes of the Oglala Sioux People. The United States' denial of access to and use of this territory moreover prevented the Oglala Sioux people from providing for their subsistence needs by their own efforts, resulting in and maintaining for the time of one hundred and three years a continuing condition of poverty, malnutrition, and high incidence of disease and of premature death.

24. The Oglala Sioux Tribe has protested all of the facts alleged in paragraphs 16 through 23 continously, publicly and notoriously since 1877. The Oglala Sioux Tribe was denied standing to challenge legally the 1877 "agreement" until 1920, when Congress authorized the Court of Claims to adjudicate any claims of the Sioux tribes against the United States. However, the Court of Claims considered itself authorized only to hear claims for money compensation and dismissed these as merely "moral" in nature. The Indian Claims Commission Act of 1946, 6 Stat. 1049, and a special authorizing act of 1978, P.L. 95-243, waived the sovereign immunity of the United States only to the extent of claims for money compensation. It was not until 28 U.S.C. § 1331 was amended in 1976 that the Oglala Sioux Tribe was enabled to seek against the United States the equitable relief demanded in the present case.

D. JURISDICTION

25. This case arises under the Treaty of September 17, 1851, 11 Stat. 749; the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635; the Act of March 3, 1871, 16 Stat. 566, 25 U.S.C. 71; the Act of August 15, 1876, 19 Stat. 176; the "agreement" incorporated in the Act of February 28, 1877, 19 Stat. 254; and the American Indian Religious Freedom Act, P.L. 95-341, 92 Stat. 469 (1978). This case also arises under Article VI and the Fifth Amendments to the United States Constitution.

26. Jurisdiction is conferred on this court by 28 U.S.C. § 1362, since this action is filed by an Indian tribe with a governing body duly recognized by the Secretary of the Interior; by 28 U.S.C. § 1331(a), since the amount in controversy exceeds the sum of ten thousand dollars, exclusive of interest and costs, arises under the Constitution, laws and treaties of the United States, and, as against the United States, seeks only equitable relief; by 28 U.S.C. § 2409a, since this is an action to quiet title to which the United States is a party; and by 28 U.S.C. § 1346 (a)(2), since it seeks damages against the United States for injury caused by acts of Congress.

27. Venue properly is in this court in accordance with 28 U.S.C. § 1391(b), since this action is not founded on diversity of citizenship and the claims all arose in this judicial district; under 28 U.S.C. § 1402(d), since this action involves quieting title to land located entirely within this judicial district, and the United States is a party; and under 28 U.S.C. § 1402(a)(1), since it includes claims for damages against the United States and the plaintiff resides in this judicial district.

28. In *United States v. Sioux Nation of Indians*, _____ U.S. ____ (1980), an action for money compensation on-

ly, the United States Supreme Court found substantially all of the facts alleged in paragraph 16 through 23. As a party to that action, the United States is estopped to deny these facts.

29. *United States v. Sioux Nation of Indians, supra,* involved trial *de novo* of certain claims for money compensation formerly before the Indian Claims Commission, and was specially authorized by P.L. 95-243, 92 Stat. 153 (1978). The Oglala Sioux Tribe allowed its contract of retainer with Indian claims counsel to expire in May of 1977, and was neither represented nor a party in the *Sioux Nation* proceedings, having expressed its intention to seek instead actual possession and ownership of the disputed territory. Former counsel nevertheless purported to continue to act as legal representative for the Oglala Sioux Tribe before the Court of Claims and the United States Supreme Court, making claims and concessions without authority. The United States is estopped from denying that counsel was not acting properly on behalf of the Oglala Sioux Tribe because, in accordance with the terms of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, the Indian Claims Commission Act of 1946, 25 U.S.C. § 70n, and Article IV of the Oglala Sioux Tribal Constitution, no contract for legal representation of the Oglala Sioux Tribe in this matter could have been lawful or effective without the prior approval of the Secretary of the Interior. The Secretary last approved such a contract in May of 1967, which contract expired in May of 1977.

30. Counsel for those Sioux tribes that were parties to *United States v. Sioux Nation of Indians* stipulated that the United States' entry, occupation, and possession of the land described in paragraph 16 had constituted a lawful exercise of the United States' power of eminent domain under the Fifth Amendment. The United States Supreme

Court expressly reserved the ussue of the constitutionality of the United States' action. Since it was not represented nor was a party in that proceeding, the Oglala Sioux Tribe is not bound by stipulations of counsel nor limited to a prayer for just compensation, and *Sioux Nation* does not and canot bar the present action.

E. CLAIMS FOR RELIEF

31. As its first claim for relief against the federal defendants, plaintiff alleges that the United States could not have acquired any territory from the Oglala Sioux Tribe by the constitutional exercise of the power of eminent domain in that:

A. The territory seized was not a part of the United States nor subject generally to the laws of the United States at the time of the purported taking.

B. The taking was not for a public use, but instead was for the sole use, benefit and profit of private citizens of the United States who for the most part already had unlawfully possessed themselves of the land in question.

C. Neither the Oglala Sioux Tribe in its collective and sovereign governmental capacity nor its citizens ever were afforded due process of law to contest the constitutionality or propriety of the taking or the adequacy of the compensation made therefor.

D. No compensation ever has been paid for the taking of the territory.

In *United States v. Sioux Nation of Indians,* ____ U.S. ____ (1980), the Supreme Court held and the United States is estopped to deny that the land in question was taken lawfully by the United States if and *only* if it was taken in

accordance with the Fifth Amendment. Since no constitutional taking ever was effected, or could be effected even with the payment of compensation, the territory in question cannot be lawfully occupied or used by the United States or its assigns, lessees or agents unless it be sold freely by the Oglala Sioux people in accordance with Article XII of the Treaty of April 29, 1868.

32. As its second claim for relief against the federal defendants, plaintiff alleges that the United States could not and cannot acquire any territory from the Oglala Sioux Tribe except in accordance with Article XII of the Treaty of April 29, 1868 because:

A. Insofar as the treaty expressly effected a limitation on the sovereign powers of each of the parties, i.e., of the United States to purchase and of the Sioux to sell, it is in its nature a "compact" as that term of art is understood in the law of nations and therefore is irrevocable without bilateral consent.

B. If, however, the United States choose to regard the Treaty of April 29, 1868 as a mere treaty, then its acts in confiscating the land of the Oglala Sioux Tribe in violation of Article XII constituted a breach of each and every term of the treaty, as understood in the laws of nations, and sets the Oglala Sioux free from the jurisdiction, control and authority of the United States to the extent that it ever did exist, and restores to the Oglala Sioux Tribe full dominion and sovereignty over all territory possessed by them in 1868.

33. As its third claim for relief against the federal defendants, plaintiff alleges that the United States could not and cannot acquire any territory from the Oglala Sioux Tribe except in accordance with Article XII of the Treaty of April 29, 1868 because:

A. When ratified by Congress, that Article had the effect and was intended to have the effect of vesting rights in the Oglala Sioux people collectively and severally, under the Constitution and the laws of the United States. Congress is powerless to divest persons of property rights vested under prior legislative enactments, except through the proper and constitutional exercise of the federal power of eminent domain.

B. Rights protected by Article XII of the Treaty of 1868 were vested or revested by the enactment of the Act of March 3, 1871, which expressly preserved all obligations of the United States to Indian tribes under previously ratified treaties.

34. As its fourth claim for relief against the federal defendants, plaintiff alleges that the United States is barred in equity from asserting any rights it may have acquired or have sought to acquire by the Act of February 28, 1877, because the United States induced the Oglala Sioux Tribe to pay valuable consideration for the inclusion of Article XII in the Treaty of April 29, 1868, having no intention to abide by that article, and further the United States wilfully violated that article six years subsequently. The United States therefore appears before this court with unclean hands.

35. As its fifth claim for relief against the federal defendants, plaintiff alleges that the right of the Oglala Sioux Tribe to hunt both within and beyond the boundaries of their reserved territory, secured by Article XI of the Treaty of April 29, 1868, never has been ceded by the Oglala Sioux Tribe in accordance with that treaty, nor lawfully taken or purportedly taken by the United States by eminent domain, nor otherwise ever constitutionally limited by the express authority of the United States, and that therefore this right exists today as it did in 1868.

36. As its sixth claim for relief against the federal defen-

dants, plaintiff alleges that it is entitled to a declaratory judgment that the Oglala Sioux Tribe remains in the sole and undisturbed right of the use and possession of all of the land described in paragraph 16, and that the right of the Oglala Sioux Tribe to hunt within and beyond the boundaries of this land, as secured by Article XI of the Treaty of April 29, 1868, continues unrestricted as it was in 1868.

37. As its seventh claim for relief against the federal defendants, plaintiff alleges that it will suffer irreparable harm and injury as a result of the continued waste and irretrievable loss of the minerals, timber and other resources contained within the territory described in paragraph 16, and therefore is entitled to a preliminary injunction restraining defendants from using, consuming, or severing, or pemitting the use, consumption, or severance of minerals, timber, soil, water, wildlife and fish within said territory; and furthermore restraining defendants from operating or permitting others to operate easements or rights-of-way within said territory.

38. As its eighth claim for relief against the federal defendants, plaintiff alleges that it is entitled to the payment of compensatory and punitive damages in the amount of one billion dollars ($1,000,000,000.00) for that hunger, malnutrition, disease, and death caused by its loss of the subsistence use and benefit of the territory described in paragraph 16 for the time of one hundred and three years.

39. As its ninth claim for relief against the federal defendants, plaintiff alleges that the past and continuing actions of the United States and of its administrative agencies deny individual Oglala Sioux people the free exercise of their ancient and traditional religion, which always did and continues to depend upon the use of the Black Hills as a holy place of worship and burial ground, so that in accordance with the First Amendment to the United States Con-

stitution, as made specially applicable to this case by the American Indian Religious Freedom Act, P.L. 95-341, plaintiff is entitled to:

A. A declaratory judgment that free and undisturbed access to the territory described in paragraph 16, without disturbance of the natural state of its land and waters, is essential to the enjoyment of the Sioux religion and is secured by the First Amendment to the United States Constitution.

B. A preliminary and permanent injunction restraining the United States and its administrative agencies from engaging in or permitting any acts that will restrict the members of the Oglala Sioux Tribe from utilizing said territory for religious purposes in the same manner and to the same extent that they did in 1868.

40. As its tenth claim for relief against the federal defendants, plaintiff alleges that it is entitled to an order directing federal defendants to conform for the present and the future with the requirements of Article XII of the Treaty of April 29, 1868, and to secure to plaintiff all lands and interests the United States purported to acquire in violation of said article in the same status and in as close as possible to its condition in 1868.

41. As its eleventh claim for relief against the federal defendants, plaintiff alleges:

a. The Act of October 19, 1973 (P.L. 93-134), 25 U.S.C.§§ 1401-1405, charges defendant Andrus with rendering payment on behalf of the United States to persons he determines is entitled to share in a judgment of the Court of Claims involving Indian tribes, and under 28 U.S.C. 2517(b), payment by the United States may operate as a full discharge of all claims and demands arising out of the matter involved in the judgment.

b. Subsequent to the original filing of this action, to-wit, July 22, 1980, the General Accounting Office of the United States certified to defendant Andrus the amount of the award in *United States v. Sioux Nation of Indians, supra.* [Claim No. Z-287 (48), Transmittal No. 231766]

c. Having knowledge or constructive knowlege of this present action, defendants United States and defendant Andrus, by himself and through the Bureau of Indian Affairs, intends to tender payment of a part of the award in *United States v. Sioux Nation of Indians, supra,* to plaintiff in order to deprive or attempt to deprive plaintiff of the remedies herein sought, by invoking 28 U.S.C. § 2517(b) as a bar.

d. Tender of payment by defendant Andrus will be an attempt to frustrate the jurisdiction of this court by ruling implicitly on plaintiff's allegation, already properly pleaded in this present action, that plaintiff was not a party in *United States v. Sioux Nation of Indians, supra.* However improper or in error, such an administrative ruling may be reviewable only in accordance with the regulations of the Department of the Interior and the Administration Procedure Act, 5 U.S.C. § 551-559, 701-706, and thus embroil plaintiff in irreparably costly and time consuming administrative appeals of matters already properly before this court.

e. On July 28, 1980, plaintiff unsuccessfully attempting to invoke the jurisdiction of the Court of Claims to stay that part of the judgment in *United States v. Sioux Nation of Indians* as the United States might allege is applicable to the Oglala Sioux Tribe. Not being a party to *United States v. Sioux Nation of Indians,* the Oglala Sioux Tribe proceeded by special appearance and motion to stay the judgment, but was denied access by Clerk Frank Peartree on the grounds the Court of Claims no longer has jurisdiction over that matter. Plaintiff therefore properly

exhausted its remedies in the Court of Claims before seeking the intercession of this court.

For all of which reasons, plaintiff is entitled to an order enjoining the United States, defendant Andrus and all officers in the Department of the Interior under his supervision from paying, attempting to pay, or tendering payment of any part of the award in *United States v. Sioux Nation of Indians* to the Oglala Sioux Tribe, and from taking any other action under 25 U.S.C. § 1401-1405 with regards to the Oglala Sioux Tribe, until final judgment in this present action.

42. As its first claim for relief against the individually named defendants, plaintiff alleges that it is entitled to a declaratory judgment that the individually named defendants could not derive any title or interest from the United States of America as against the Oglala Sioux Tribe, to any land, minerals, waters, easements or other interests within the territory described in paragraph 16.

43. As its first claim for relief against the State, County and Municipal defendants, plaintiff alleges that it is entitled to a declaratory judgment that the State of South Dakota, and all subdivisions exercising authority under the Constitution and laws of the State of South Dakota, could not derive any lawful title or interest from the United States of America, as against the Oglala Sioux Tribe, to any land, minerals, waters, easements or other interests within the territory described in paragraph 16.

44. As its second claim for relief against the individually named defendants, plaintiff alleges that it has been damaged in the amount of not less than ten billion dollars ($10,000,000,000.) by the severance and removal from the land described in paragraph 16 of non-renewable resources including but not limited to gold, silver, and ores of iron and uranium, and of renewable resources including but not limited to timber, fish and wildlife and water, the

use of all of which has been diverted for one hundred and three years from the Oglala Sioux Tribe.

45. As its final claim for relief against the federal defendants, the State of South Dakota and its political subdivisions, and the individually named defendants, plaintiff alleges that it is entitled to shift the burden of proof as to right, title and ownership of the territory described in paragraph 16 because:

A. Shifting the burden of proof is required by 25 U.S.C. § 194, in that this action involves a "trial about the right of property in which an Indian may be a party on one side, and a white person on the other."

B. The documentary title of the Oglala Sioux Tribe to said land, being the Treaty of April 29, 1868, is prior to and superior to the Act of February 28, 1877, under which the United States States and its successors in interest may claim, since the validity in law of the act, and not the treaty, is questioned.

WHEREFORE, plaintiff prays that this court:

1. Quiet the title of the Oglala Sioux Tribe to the territory described in paragraph 16, restoring to the Oglala Sioux Tribe absolute undisturbed dominion, use and possession of the same;

2. Declare that the right of the Oglala Sioux Tribe to hunt within and beyond the limits of said territory continues undiminished;

3. Enjoin the United States from removing, or permitting others to remove minerals, timber, and other resources from said territory, and from committing any waste thereon;

4. Enjoin the State of South Dakota, its political subsdivisions, and the individually named defendants

from removing, or permitting others to remove minerals, timber, and other resources from said territory, and from committing any waste thereon;

5. Enjoin the United States, and in particular, defendants Andrus and Bergland, from further interfering with Oglala Sioux use of said territory for subsistence and religious purposes;

6. Award plaintiff damages against the individually named defendants in the amount of ten billion dollars ($10,000,000,000.) for trespass and waste;

7. Award plaintiff damages against the United States in the amount of one billion dollars ($1,000,000,000.) for hardship and suffering caused by denying plaintiff access to and use of said territory;

8. Shift the burden of proof of right and title to the defendants;

9. Enjoin defendants Andrus and all officers and employees of the United States under his supervision from paying, attempting to pay, or tendering payment of any part of the award in *United States v. Sioux Nation of Indians* to plaintiff, and from taking any other action under 25 U.S.C. §§ 1401-1405 with regard to the Oglala Sioux Tribe; and

10. Such other relief as this court may deem just and proper. Dated this 1st day of August, 1980.

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Opposition

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No. 81-722

In the Supreme Court of the United States

OCTOBER TERM, 1981

OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION, PETITIONER

v.

THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Indian Claims Commission Act of 1946, as amended, 25 U.S.C. 70 *et seq.*, provided the sole and exclusive remedy for tribal treaty claims against the United States arising prior to 1946, and thus precludes federal jurisdiction over a suit filed in 1980 for recovery of tribal lands removed from the Tribe's treaty reservation by an Act of Congress in 1877.

2. Whether the Tribe's pursuit of the Indian Claims Commission remedy to judgment against the United States to obtain compensation for the lands taken in 1877 bars this suit for recovery of the same lands and damages for their use.

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v.

THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 650 F.2d 140. The opinion of the district court (Pet. App. 1c-14c) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1b-2b) was entered on June 1, 1981. A petition for rehearing was denied on July 30, 1981. The petition for a writ of certiorari was filed on October 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) (*"Sioux III"*), this Court affirmed the judgment of the Court of Claims awarding to the Sioux Nation $17.5 million in compensation, plus interest accrued since 1877, for the federal government's taking of the Black Hills by the Act of Feb. 28, 1877, ch. 72, 19 Stat. 254. Within three weeks of this Court's decision in *Sioux III*, petitioner Oglala Sioux Tribe of the Pine Ridge Reservation ("Oglala") brought this action—

> to quiet title of the Oglala Sioux Tribe to seven million acres, more or less, of its original national territory [in the Black Hills of South Dakota], all of which was confiscated unlawfully and unconstitutionally by the United States of America in 1877, and now is in the possession of the defendants. This action seeks to restore the territorial rights of the Oglala Sioux Tribe to their status had no confiscation occurred, and therefore plaintiff also seeks [$11 billion in] damages for waste, severance of minerals, and wrongful exclusion from the use of this territory for religious and subsistence purposes.

Complaint ¶ 1, Pet. App. 2e. Named as defendants were the United States and officers thereof, the State of South Dakota and several local governmental entities, and several classes of private parties in possession of lands under color of title derived from the United States (*id.*, at ¶¶ 3-15, Pet. App. 3e-6e).

1. In *Sioux III*, *supra*, 448 U.S. at 374-384, this Court detailed the historical facts underlying the century-old claim of the Sioux that in 1877 Congress had unlawfully abrogated the Fort Laramie Treaty

of Apr. 29, 1868, 15 Stat. 635, by removing the Black Hills of South Dakota from the Great Sioux Reservation. The Court also described the lengthy history of litigation on this claim, dating from Congress' passage in 1920 of a special jurisdictional Act providing the Sioux a forum for their claim in the Court of Claims. *Sioux III*, *supra*, 448 U.S. at 384-390; see Act of June 3, 1920, ch. 222, 41 Stat. 738. In the original proceeding, the Court of Claims held that the Sioux had not proven a taking without just compensation in violation of the Fifth Amendment and that the court lacked equitable jurisdiction to consider whether Congress had provided adequate consideration for the Black Hills. *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613, 666, 685 (1942), cert. denied, 318 U.S. 789 (1943) (*"Sioux I"*). The members of the Sioux Tribe of Indians * * * of the Pine Ridge Indian Reservation * * *," *i.e.*, the Oglala, were among the plaintiffs in that proceeding. 97 Ct. Cl. at 621.

2. Subsequently, the Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, created a forum with jurisdiction to hear Indian claims based not only on the taking of property without the just compensation required by the Fifth Amendment, but also on the inadequacy of consideration for actions of the federal government that were not takings of property in the constitutional sense.[1] The Sioux resubmitted their Black Hills claim

[1] 25 U.S.C. 70a provides in part: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe * * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable con-

to the Commission. Ultimately (see *Sioux III*, *supra*, 448 U.S. at 385-389), the Court of Claims affirmed the holding of the Indian Claims Commission that the Sioux were entitled to a judgment of $17.5 million in additional consideration for the Black Hills. But the Court of Claims reversed the Commission's holding that Congress had effected a Fifth Amendment taking entitling the Sioux to interest on the award of compensation dating from 1877, holding that the taking claim was barred by res judicata under *Sioux I*. *United States* v. *Sioux Nation*, 518 F.2d 1298 (Ct. Cl.), cert. denied, 423 U.S. 1016 (1975) ("*Sioux II*"). As in *Sioux I*, the Oglala were party to these proceedings, *Sioux Nation* v. *United States*, 33 Ind. Cl. Comm. 151, 243-244 (1974), including this Court's denial of certiorari. See Petition for a Writ of Certiorari, No. 75-456, 1975 Term, at 1 n.*

3. By the Act of Mar. 13, 1978,[2] Congress removed the bar of res judicata to the Sioux's Fifth Amendment claim and authorized the Court of Claims to conduct a de novo review of that issue on the merits. See *Sioux III*, *supra*, 448 U.S. at 389, 391. The Court of Claims then held that the 1877 Act had effected a Fifth Amendment taking for which

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sideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission * * *."

[2] Pub. L. No. 95-243, 92 Stat. 153, amending Section 20(b) of the Indian Claims Commission Act. See 25 U.S.C. 70s(b).

the Sioux were entitled to just compensation, including interest dating from 1877. *Sioux Nation* v. *United States*, 601 F.2d 1157 (Ct. Cl. 1979). This Court affirmed in *Sioux III*, *supra*, 448 U.S. at 423-424.[3]

4. In the present action, seeking principally to obtain "actual possession and ownership of the disputed territory" (Complaint ¶ 29, Pet. App. 11e) rather than compensation for loss of the territory, the Oglala allege (*ibid.*) that because their contract with counsel representing them in the *Sioux Nation* litigation expired in May 1977, the Oglala are not "bound" by the award of a money judgment in *Sioux III* following the Court of Claims' de novo review on the "taking" issue (Pet. 5). By the present action, the Oglala instead "preferred to elect [other] equitable and constitutional remedies" (*ibid.*).

After reviewing and rejecting each of the alleged bases for federal jurisdiction (Pet. App. 7c-10c),[4] the district court held that—

> the present suit is a suit against the sovereign, that Congress created a special and exclusive remedy under the Indian Claims Commission Act for the claims raised here, and that accordingly this action cannot be maintained against the United States in this Court.

Pet. App. 14c. Holding that the United States "is obviously an indispensable party" (*ibid.*), the dis-

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[3] In its subsequent decision on the motion of the Sioux's counsel for attorney's fees, the Court of Claims noted: "On July 22, 1980, $105,994,430.52 was credited by the Secretary of the Treasury to the Sioux's account." *Sioux Nation of Indians* v. *United States*, 650 F.2d 244, 247 (Ct. Cl. 1981). See Pet. App. 6c.

[4] The Complaint (¶ 26) alleges jurisdiction under 28 U.S.C. 1362, 1331(a), 1346(a)(2), and 2409(a) (Pet. App. 10e).

trict court dismissed the complaint as to the non-federal parties as well, pursuant to Fed. R. Civ. P. 19(b). The court of appeals affirmed (Pet. App. 1a-7a), concluding that "Congress has deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy for the alleged wrongful taking through the enactment of the Indian Claims Commission Act" (*id.* at 5a). Neither court below found it necessary to decide the sufficiency of other defenses, such as the defense of res judicata based on the Oglala's participation in the *Sioux* cases (Pet. App. 5a n.8, 5c n.3).

ARGUMENT

The decision of the court of appeals is clearly correct and conflicts with no decision of this Court or of the other courts of appeals. Moreover, there are other grounds, which the courts below found it unnecessary to reach, that would require affirmance in any event. Review by this Court is therefore unwarranted.

1. Section 12 of the Indian Claims Commission Act, 25 U.S.C. 70k, provides:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.[6]

As the court of appeals correctly held (Pet. App. 7a; footnote omitted):

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[6] As to Indian claims arising after August 13, 1946, Section 24 of the Act, 28 U.S.C. 1505, provides jurisdiction in the Court of Claims. See *United States* v. *Mitchell*, 445 U.S. 535, 539-540 & n.2 (1980).

> Th[e] precise statutory language [of 25 U.S.C. 70k] reflects Congress' intention to provide a one-time, exclusive forum for the resolution of Indian treaty claims.

The district court's opinion sets forth (Pet. App. 11c-12c) enough of the legislative history of the Indian Claims Commission Act to demonstrate that Congress indeed intended exactly what the Act says.[6] Although the Oglala here seek return of the Black Hills and damages for their use by others since 1877, the claims on which the Tribe seeks such relief are plainly ones Congress directed to the Indian Claims Commission under 25 U.S.C. 70a.

Given the district court's lack of jurisdiction over the United States, its dismissal (Pet. App. 14c) of the remaining non-federal parties was also correct. The Tribe's claims against such parties are derived entirely from its claims against the United States, *i.e.*, that (1) the Act of Feb. 28, 1877, which took the Black Hills from the Sioux, is unlawful and void; and (2) the subsequent disposal by the federal government of large portions of the Black Hills as public lands to third parties is similarly wrongful and ineffective. In such circumstances, the Oglala must obtain relief against the United States, or not at all.

2. Moreover, the Oglala *have* obtained relief from the United States under the very statutory remedy the court of appeals held to be exclusive. Even if, arguendo, other rights of action leading to other relief were once available, the Tribe has pursued to final

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[6] The district court also conducted (Pet. App. 7c-10c) an independent examination of each of the bases for federal jurisdiction—and waiver of sovereign immunity—alleged by the Oglala. Its analysis correctly demonstrates that none provides jurisdiction over the United States here.

judgment its claims brought before the Indian Claims Commission under 25 U.S.C. 70a. See pages 3-5, *supra*.[7] If, as urged (Pet. 5), the Oglala were not a party to *Sioux III*, then *Sioux II* stands as the final adjudication of their claims because any action to obtain de novo review of *Sioux II* on the "taking" issue was required to have been brought in the Court of Claims "within thirty days from the date of the enactment" of the Act of Mar. 13, 1978, Pub. L. No. 95-243, 92 Stat. 153. The present suit, to reopen that issue, which was brought much later in district court, not the Court of Claims, therefore is barred.

At all events, there is no merit to the Tribe's contention that it is not "bound" by (and benefited by) the final judgment in *Sioux III*, concededly obtained by the other "1868 Treaty" tribes (Pet. 5) constituting the Sioux Nation of Indians. Under the 1868 Treaty of Fort Laramie, 15 Stat. 635, the several Sioux tribes jointly held beneficial *and undivided* title to the Black Hills. Not until the Act of Mar. 2, 1889, ch. 405, 25 Stat. 888—12 years after the removal of the Black Hills—were six separate reservations carved out of the remainder. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589 (1977). *Sioux III* therefore was litigated by tribes in privity with the Oglala. See Art. XII of the 1868 Treaty, 15 Stat. 639 (cession could be approved "by three fourths of all the adult male Indians"); cf. *Western Shoshone Legal Defense & Education Association* v. *United States*, 531 F.2d 495, 503-504 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976) (tribal members opposed to tribe's effort to obtain compensation on "taking" theory denied op-

[7] The Oglala also were parties in *Sioux I*, *supra*, brought under a special jurisdictional act to obtain just compensation for the Black Hills, and *not* for return of these lands. See page 3, *supra*.

portunity to "upset the applecart after the fruit has been so carefully collected and piled * * *"). And the Tribe would surely have been joined as an involuntary plaintiff had its purported absence been noticed. See Ct. Cl. R. 41, 62.

Thus, whether by the doctrines of res judicata, collateral estoppel, or election of remedies, the Oglala are clearly bound by *Sioux III*, in which this Court stated that

> there is no doubt that the Black Hills were "taken" from the Sioux in a way that wholly deprived them of their property rights to that land.

448 U.S. at 409 n.26; see *id.* at 411 n.27, 414 n.28 ("[T]he Sioux concede the constitutionality of Congress' unilateral abrogation of the Fort Laramie Treaty.").

3. The short answer to the Tribe's claims that the 1877 taking of the Black Hills is void (1) for want of a "public purpose" (Pet. 4), and (2) as an impermissible burden on their religious beliefs and practices (*ibid.*),[8] is that these late claims are precluded by 30 years' litigation on an entirely inconsistent theory.[9] The decisions below do not, as urged (Pet.

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[8] Petitioner's First Amendment claim receives here far greater emphasis than it was given below. See, *e.g.*, the Tribe's brief-in-chief in the court of appeals, which mentions the First Amendment twice (Br. 23, 28) in the course of a 49-page argument.

[9] As the district court noted (Pet. App. 11c-12c), Congress intended for the Indian Claims Commission Act to provide a final and definitive resolution of Indian land claims and related matters. See H.R. Rep. No. 1466, 79th Cong., 2d Sess. I-4 (1945). See also 25 U.S.C. 70u(a) ("The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of all claims and demands touching any of the matters involved in the controversy.").

15), relegate the Oglala to "a forum that no longer exists," but simply hold them to one or another of the judgments already obtained in that forum. Nor does anything held below trench upon the Oglala's right to seek judicial relief today on a fresh claim that present-day action by the federal government is unconstitutionally affecting their personal or property rights. See, *e.g.*, *Sequoyah* v. *TVA*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); *Badoni* v. *Higginson*, 638 F.2d 172 (10th Cir. 1980), cert. denied, No. 80-1688 (June 16, 1981).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1981

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[10] Indeed, to the extent the Black Hills are still owned and managed by the federal government, the Tribe's religious beliefs and practices will presumably receive appropriate accommodation in the course of federal use of these lands. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. (Supp. III) 1996.

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Opposition

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NO. 81-722

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OCTOBER TERM, 1981

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS THE STATE OF SOUTH DAKOTA, ET AL, IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE INDIAN CLAIMS COMMISSION ACT CONSTITUTES AN EXCLUSIVE REMEDY FOR A TAKING OF INDIAN LANDS PURSUANT TO THE ACT OF FEBRUARY 28, 1877.

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Respondents.

BRIEF FOR RESPONDENTS THE STATE OF SOUTH DAKOTA, ET AL, IN OPPOSITION

QUESTION PRESENTED

WHETHER THE INDIAN CLAIMS COMMISSION ACT CONSTITUTES AN EXCLUSIVE REMEDY

FOR A TAKING OF INDIAN LANDS PURSUANT TO THE ACT OF FEBRUARY 28, 1877.

OPINIONS BELOW

The opinion of the court of appeals is reported at 650 F.2d 140, and is found in Petitioner's Appendix 1a-7a. The opinion of the district court is unreported, but is found in Petitioner's Appendix 1c-14c.

STATEMENT OF THE CASE

The essential historical facts of this action are set forth in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). In summary, this Court ruled in that opinion that the Act of February 28, 1877, 19 Stat. 254, constituted a taking of the Black Hills of South Dakota by the United States government which implied an obligation to render compensation to the Sioux Nation and by so finding, it affirmed the Indian Claims Commission award of 17.1 million dollars, plus interest from the date of taking.

On July 18, 1980, the Petitioner filed this action. Named as Defendants were the United States, the Secretary of Interior, the Secretary of Agriculture, the State of South Dakota, seven of its counties, nine of its municipalities and various individual and corporate landowners. The district court dismissed the action against the United States for lack of jurisdiction, after finding no statutory waiver of sovereign immunity. The action was dismissed as to the remaining Defendants upon the finding that the United States was an indispensable party.

The dismissal was then appealed by the Petitioner to the Eighth Circuit Court of Appeals. That court, on June 1, 1981, affirmed the district court's dismissal of the action as to all Defendants on the ground that Congress had removed from the district court jurisdiction to hear the action by providing an exclusive remedy through the Indian Claims Commission Act. Oglala Sioux Tribe, etc. v. United States, 650 F.2d 140, 143 (8th Cir. 1980).

SUMMARY OF ARGUMENT

The Petition for Certiorari should be denied because this case does not merit the Court's review. The opinions below were an accurate and correct application of the Indian Claims Commission Act and this Court's opinions. These facts were given a full and complete review by this Court in Sioux Nation. This controversy should be put to an end and allow the dispersal of the fair and responsible money award already rendered.

ARGUMENT

The opinion of the Eighth Circuit Court of Appeals was a correct application of the Indian Claims Commission Act and the opinions of this Court. This case does not merit another review.

I

Congress created the Indian Claims Commission for the express purpose of adjudicating and bringing to an end all Indian claims accruing before 1946. 25 U.S.C. §§ 70a-70v

(1976). The Act expressly provided that all pre-1946 claims not brought before it would be barred:

> The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor shall such claim be thereafter entertained by Congress. 60 stat. 1049 § 12 (1946).

The statutory language set forth above could not be clearer. The court below properly held that the Petitioner's claim was one arising before 1946 and therefore could only be presented to the Indian Claims Commission. The Petitioner had full and ample opportunity to raise the constitutional issues they now find so vital to the Indian Claims Commission, but simply failed to do so. Temoak Band of Western Shoshone Indians, Nevada v. United States, 593 F.2d 994, 998 (Ct. Cl. 1979); Six Nations of Confederacy v. Andrus, 610 F.2d 996, 998 (D.C. Cir. 1979).

In establishing the exclusive remedy for Indian claims accruing prior to 1946, Congress was acting within its authority to provide alternative remedies for such claims. Carlson v. Green, 446 U.S. 14, 19 (1980). The Petitioner was a part of a group that made full use of this alternative remedy and was successful in obtaining a monetary award exceeding one hundred million dollars. Petitioner would now ask the Court to allow it to change horses long past the middle of the stream and ignore over sixty years of litigation, which once and for all was settled by this Court in Sioux Nation. Petitioner has had its day in court and had full opportunity to present all arguments in support of its claim. This century old controversy was finally put to an end in 1980 and this Court should not revive the speculation over the social chaos which would result from awarding Petitioner's claimed relief.

CONCLUSION

The Respondent, State of South Dakota, et al., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Opposition

3

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No. 81-722

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT CURTIS S. McKEE IN OPPOSITION

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QUESTIONS PRESENTED

Whether the remedy provided by the Indian Claims Commission Act, which authorized the recovery of just compensation for takings of constitutionally-protected Indian property, constituted the exclusive remedy for an 1877 taking by the United States of the seven million acre Black Hills area of South Dakota?

Whether a United States District Court may now consider a challenge to the validity of the taking in 1877 by the United States of the seven million acre Black Hills area of South Dakota after this Court determined in its 1980 decision in *United States v. Sioux Nation* that a taking had occurred and affirmed an award of $105 million as just compensation for the taking?

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No. 81-722

IN THE

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OCTOBER TERM, 1981

OGLALA SIOUX TRIBE OF THE
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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR RESPONDENT CURTIS S. McKEE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 650 F.2d 140. The opinion of the district court (Pet. App. 1c-14c) is unreported.

STATEMENT OF THE CASE

This is an action brought by the Oglala Sioux Tribe of the Pine Ridge Indian Reservation ("the Oglala") seeking to quiet title to and to be restored to possession

of approximately 7,345,000 acres of land in western South Dakota that is currently held by the United States, by the State of South Dakota and its subdivisions, and by literally tens of thousands of private persons. The Oglala also seek to recover $1 billion in damages from the United States and $10 billion in damages from private defendants as compensation for the losses the Oglala allegedly suffered by virtue of the allegedly unlawful taking of the claimed land in 1877 by the United States. The Oglala further seek various forms of equitable relief. Amended Complaint, Pet. App. E.

The claim raised by the Oglala in this case has a long history, and the facts underlying this case are discussed extensively in the Court's opinion in *United States v. Sioux Nation*, 448 U.S. 371 (1980). By the Treaty of Fort Laramie of April 29, 1868, 15 Stat. 635, the United States acknowledged the right of several Sioux tribes (often referred to collectively as the Sioux Nation), including the Oglala, to occupy an area that now is roughly the western half of South Dakota. The lands at issue in this lawsuit (hereinafter referred to as the Black Hills) formed a portion of that "reservation." In 1877 Congress altered the boundaries of the reservation, adding to it some 900,000 acres of land in North Dakota and deleting from it the Black Hills. Act of Feb. 28, 1877, c. 72, 19 Stat. 254.

The Sioux asserted that they were entitled to compensation for the taking of the Black Hills, and, pursuant to a special jurisdictional act passed by Congress in 1920, the Sioux brought suit in the Court of Claims to recover from the United States compensation under the fifth amendment for the taking of the Black Hills. The Court of Claims ruled against the Sioux in 1942. *Sioux Tribe v. United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943).

In 1946 Congress enacted the Indian Claims Commission Act, which provided a forum for the resolution of ancient Indian claims. *See* 25 U.S.C. §§ 70a-70v (1976). Under the authority of that Act several Sioux tribes, including the Oglala, brought an action before the Indian Claims Commission, again seeking to recover just compensation under the fifth amendment for the taking of the Black Hills. After a byzantine series of procedural rulings, the Indian Claims Commission entered an interlocutory decision and order holding that the Sioux Nation (including the Oglala) was entitled to receive compensation under the fifth amendment for the taking of the Black Hills. *Sioux Nation v. United States,* 33 Ind. Cl. Comm. 151 (1974). The decision was appealed by the United States to the Court of Claims. The Court of Claims reversed the Commission on the ground that the earlier Court of Claims decision in 1942 was res judicata, thus barring the fifth amendment claim, and remanded the case to the Commission for further proceedings. *United States v. Sioux Nation,* 518 F.2d 1298 (Ct. Cl.), *cert. denied,* 423 U.S. 1016 (1975). In 1978, Congress enacted a statute directing the Court of Claims, upon application of the Indian claimants, to review the merits of the Indian Claims Commission's determination that the 1877 Act effected a fifth amendment taking of the Black Hills without regard to the defenses of res judicata and collateral estoppel, Pub. L. No. 95-243, 92 Stat. 153 (1978), and, acting pursuant to the 1978 statute, the Court of Claims again reviewed the Indian Claims Commission's determination. This time the Court of Claims affirmed the Commission's holding that the 1877 Act effected a taking of the Black Hills, thereby entitling the Sioux to approximately $105 million as the measure of just compensation under the fifth amendment. *Sioux Nation v. United States,* 601 F.2d

1157 (Ct. Cl. 1979). This Court granted certiorari and affirmed the decision of the Court of Claims. *United States v. Sioux Nation*, 448 U.S. 371 (1980). Upon the affirmance of the $105 million award by this Court, the money was automatically appropriated by Congress pursuant to 31 U.S.C. § 724a (Supp. II 1978), and was paid to the Department of the Interior to be held in trust for the constituent tribes of the Sioux Nation, including the Oglala. Pet. App. C at 6c.

On July 18, 1980, after this Court had issued its opinion affirming the $105 million award in favor of the Sioux Nation, the Oglala filed this action in the United States District Court for the District of South Dakota, Western Division, against the United States, the Secretary of the Interior, the Secretary of Agriculture, the State of South Dakota, seven counties and nine municipalities, and 76 private individual and corporate defendants. On September 11, 1980, the district court issued its opinion and order dismissing the action against all defendants on the grounds that sovereign immunity barred the action against the United States and its officials and that the United States was an indispensable party to any action against the remaining defendants.

The tribe appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit, and on June 1, 1981, the Court of Appeals issued its decision affirming the dismissal of the Oglala complaint against all defendants on the ground that the remedy provided to the Oglala by the Indian Claims Commission Act was the exclusive remedy available for the Oglala claim. 650 F.2d 140 (1981). On July 30, 1981, the Eighth Circuit denied the Oglala motion for rehearing.

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because none of the considerations that are set out in Rule 17 of the Court's rules as justifying a grant of certiorari is present in this case. In particular, there is no conflict between the decision below and applicable decisions of this Court, nor does the decision below present a question of federal law deserving the Court's attention. Finally, the Court exhaustively considered and disposed of issues underlying this action in a decision rendered in the 1979 Term, and it would be a misallocation of the Court's resources to devote any further consideration to these issues at this time.

ARGUMENT

There is no conflict between the decision below and applicable decisions of this Court. The decision below does not present a question of federal law deserving the Court's attention. Therefore, the petition for a writ of certiorari should be denied.

I.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND APPLICABLE DECISIONS OF THIS COURT.

There can be no conflict between the decision below and any decision of this Court, because this Court has never directly considered the issue addressed by the Eighth Circuit's decision—*i.e.*, whether Congress intended that the remedy provided by the Indian Claims Commission Act constitute the exclusive remedy for the type of claim asserted by the Oglala. In resolving this issue, the Eighth Circuit conformed to the applicable precedents established by this Court.

The decision below, far from conflicting with the Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), as petitioner alleges, is in fact completely consistent with it. *Carlson* explicitly recognized that Congress could preclude the assertion of an otherwise valid implied cause of action under the Constitution by providing an equivalent xclusive remedy for the injury. In *Carlson* the Court stated:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

Id. at 18-19. The Eighth Circuit applied this language from *Carlson* to the facts before it, and determined that the remedy provided by the Indian Claims Commission Act was precisely the type of congressionally-mandated, equally effective remedy that *Carlson* recognized. In so holding, the Eighth Circuit relied on decisions by the United States Court of Appeals for the District of Columbia Circuit and by the Court of Claims that had reached a similar result in related circumstances. 650 F.2d at 143, Pet. App. A at 7a, *citing Six Nations Confederacy v. Andrus*, 610 F.2d 996, 998 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980); *Temoak Band of Western Shoshone Indians, Nevada v. United States*, 593 F.2d 994, 998 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979).

Nor does the decision below conflict with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), or *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). Nothing in the Eighth Circuit's opinion calls into question the power of this Court to determine the constitutionality of congressional legislation. Furthermore, *Martin* and *Cohens* primarily stand for the proposition that this Court has the power to review decisions of state courts in matters of constitutional interpretation, and thus are inapposite here, since no state court decisions are involved.

II.

THIS CASE PRESENTS NO QUESTION OF FEDERAL LAW THAT DESERVES THE ATTENTION OF THIS COURT.

Despite petitioner's attempts to portray this case as one of enormous constitutional importance, this case in fact presents no issue of federal law that deserves the Court's attention.

It is well settled by decisions of this Court that Congress has the power to define and limit the jurisdiction of inferior federal courts. In *Palmore v. United States* the Court stated:

> The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. . . . "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with

> jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

411 U.S. 389, 400-01 (1973); *see Bruner v. United States*, 343 U.S. 112, 114 (1952); *Yakus v. United States*, 321 U.S. 414, 429 (1943); *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943). This is particularly true where, as here, the claim at issue is a claim against the federal government. "Congress has power to regulate which federal court shall hear suits against the Federal Government." *Allen v. Board of Elections*, 393 U.S. 544, 559 (1969). Thus no important question of federal law is raised when Congress requires that Indian claims, such as the one asserted below by petitioner, be brought before the Indian Claims Commission and Court of Claims.[1]

Nor do petitioner's first amendment arguments raise any questions of federal law worthy of the Court's attention. It is well settled that all private property—and thus by necessary implication private property owned by churches or other religious organizations and used for worship—is subject to a valid exercise of the eminent domain power. *See, e.g., United States v. Carmack*, 329 U.S. 230, 236 (1946); *Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685, 689 (1897); *Kohl v.*

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[1] Petitioner is being disingenuous when it argues that the remedy provided by the Indian Claims Commission is inadequate because the Indian Claims Commission no longer exists. *See* Pet. Br. at 15. The point is that the Commission, when it was in existence, did provide petitioner a sufficient opportunity to pursue a constitutionally adequate remedy, and petitioner in fact availed itself of that opportunity and is entitled to share in the $105 million award that that remedy produced. *See* note 3, *infra*.

United States, 91 U.S. (1 Otto) 367, 371 (1876). More to the point, the 1877 congressional acquisition of the entire 7.3 million acre Black Hills region cannot reasonably be analogized to the present-day condemnation of a church building, as petitioner attempts to do.

III.

THIS COURT DISPOSED OF THE KEY ISSUES RELATING TO THE ACQUISITION OF THE BLACK HILLS IN ITS 1980 DECISION IN *UNITED STATES v. SIOUX NATION.*

This Court has already devoted considerable attention to the key issues relating to the 1877 acquisition of the Black Hills by Congress in its decision in *United States v. Sioux Nation*, 448 U.S. 371 (1980), and it would be a misallocation of the Court's resources to reconsider these issues. In that decision the Court exhaustively analyzed the circumstances surrounding the 1877 Act and determined that it constituted a taking of the Sioux property rights in the Black Hills for which just compensation was required. This compensation has now been paid. Petitioner's contention below that the Black Hills were not validly acquired by the United States and thus title to the land remains in the Sioux is directly contrary to the basis of the decision in *Sioux Nation*.[2] Petitioner's

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[2]The fundamental and unchallenged premise of the Court in *Sioux Nation* was that the United States acquired the complete title to the Black Hills in 1877, thereby extinguishing any rights to the land that the Sioux may previously have held. As the Court stated:

> Here, there is no doubt that the Black Hills were "taken" from the Sioux in a way that wholly deprived them of their property rights to that land. The question presented is whether Congress was acting under circumstances in which that "taking" implied an obligation to pay just compensa-

[footnote continued]

contention necessarily would require the Court to abandon both the reasoning and the result of its decision in *Sioux Nation.* None of the arguments advanced by petitioner would justify the Court's repudiation of its decision in *Sioux Nation* only two terms after it was rendered.[3]

Furthermore, the Act of February 28, 1877, 19 Stat. 254, was a proper exercise of congressional power to dispose of Indian tribal lands that extinguished the title of the Sioux to the Black Hills as of the date of the Act. It is clear that in this case Congress exercised its eminent

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tion, or whether it was acting pursuant to its unique powers to manage and control tribal property as the guardian of Indian welfare, in which event the Just Compensation Clause would not apply."

United States v. Sioux Nation, 448 U.S. at 409 n.26.

[3]Any repudiation of *Sioux Nation* would be further complicated by the fact that the other Sioux tribes entitled to share in the judgment in *Sioux Nation* have not joined in petitioner's suit and thus presumably are entitled to retain their share of the $105 million awarded for the taking of the Black Hills, even though the logic of petitioner's contention is that no compensation for the taking was due because no valid taking had occurred.

Nor does respondent McKee agree that petitioner was not a party to the decision in *Sioux Nation.* Petitioner was found to be a party to the Indian Claims Commission proceeding in 1974, *Sioux Nation v. United States,* 33 Ind. Cl. Comm. 151, 243–44 (1974) (finding of fact number 1), and was never dismissed as a party to that proceeding at any time up to and including the time that the decision of the Court was rendered in *Sioux Nation* on June 30, 1980. Once a person becomes a party to a judicial proceeding, that person cannot withdraw or be dismissed as a party except by order of the court. *See Armstrong v. Frostie Co.,* 453 F.2d 914, 916 (4th Cir. 1971) (construing Fed. R. Civ. P. 41(a)(2)); Fed. R. Civ. P. 41(a)(2); Ct. Cl. R. 102(a)(2). Since petitioner was never dismissed as a party to the proceeding before the Indian Claims Commission, it remained a party throughout, and as a party it is now bound by the judgment entered in that proceeding as affirmed by the Court of Claims and this Court.

domain power to further public purposes that were well within its constitutional authority. The long-recognized plenary power of Congress to control, manage, and dispose of lands held by Indian tribes, *see e.g., United States v. Sioux Nation,* 448 U.S. 371, 422 (1980); *United States v. Creek Nation,* 295 U.S. 103, 109-10 (1935); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 565 (1903), as well as the congressional power to regulate commerce with the Indian tribes, U.S. Const. art. I, § 8, cl. 3, the congressional power over the public lands of the United States, *id.* art. IV, § 3, cl. 2, and the congressional power to provide for the national defense, *id.* art. I, § 8, cl. 11, 12, all provided sufficient public purposes for the acquisition of the Black Hills.[4] Moreover, "[t]he role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Berman v. Parker,* 348 U.S. 26, 32 (1954); *accord United States ex rel. TVA v. Welch,* 327 U.S. 546, 551-52 (1946).

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[4]The legislative history of the 1877 Act suggests additional public purposes underlying the congressional decision to acquire the Black Hills. One purpose was to enable the territorial laws and court system to be extended to the miners who had moved into the Black Hills; this step was considered necessary for the protection of both the Indians and the miners. 22 Cong. Rec. 1615 (Feb. 15, 1877) (remarks of Congressman Seelye). Another purpose was to make it easier to supply rations to the Indians; a third purpose was to foster the then-popular policy of encouraging the Indians to become agriculturalists. *Id.* (remarks of Congressman Boone). In addition, by acquiring the Black Hills Congress safeguarded transportation routes to the West and provided additional lands for settlement by homesteaders. *See generally* 43 U.S.C. § 161 *et seq.* (1976) (codification of homestead laws). Finally, by acquiring the Black Hills Congress hoped to prevent further warfare between the Sioux and the armed forces of the United States. All of these purposes demonstrate that Congress took the Black Hills for a public purpose.

Finally, the Sioux have been provided ample opportunities to litigate the issues presented by the 1877 Act, and it is high time for litigation regarding the 1877 acquisition of the Black Hills to be brought to an end. Three times the Court of Claims has considered the matter—in 1942, 1975, and 1979. *See Sioux Nation v. United States,* 601 F.2d 1157 (Ct. Cl. 1979); *United States v. Sioux Nation,* 518 F.2d 1298 (Ct. Cl. 1975); *Sioux Tribe v. United States,* 97 Ct. Cl. 613 (1942). In addition to its 1980 *Sioux Nation* decision, this Court has twice denied certiorari from Court of Claims decisions in the matter—in 1943 and 1975. *See Sioux Nation v. United States,* 423 U.S. 1016 (1975); *Sioux Tribe v. United States,* 318 U.S. 789 (1943). Now the United States District Court for the District of South Dakota and the United States Court of Appeals for the Eighth Circuit have had occasion to consider the matter.[5] In one forum or another, litigation concerning the 1877 acquisition of the Black Hills has been underway since 1920. Sixty years of litigation is enough.

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[5] Indeed, respondent McKee believes that this prior litigation gives rise to defenses of res judicata, collateral estoppel, and laches that bar petitioner's claim. Because of its disposition of the case, the Eighth Circuit in its decision below found it unnecessary to consider these defenses. 650 F.2d at 143 n.8.

CONCLUSION

The petition for a writ of certiorari should be denied.

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